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PROSPECTUS

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AMERICAN LAW REGISTER.

The elevation of the prineipal Editor of the American Law Journal to the Supreme Court of Pennsylvania, suspended for some time the publication of that Work, and with the fourth volume the series was closed. To meet the wants of the Profession throughout the United States, it is proposed to publish at Philadelphia, a new Legal Periodieal, to be called The American Law Register, the charaeter and design of which will be briefly stated.

The increase in England and in this eountry, of the number of the Reports, of whieh over one hundred volumes are now printed annually, has become so great that no Judge or Lawyer ean command the time to read, or the means to buy, all whieh appear, nor ean he supply the necessity whieh he is under of familiarizing himself with the current of decision, through the medium of the Digests, except in a very imperfect manner. It is indispensable therefore, that some plan should be adopted by which the most important cases, that is, those which involve either *new principles* or a *novel application* of those already established, should be colleeted in a convenient form. With a view to this want, it will be one of the principal objects of the Law Register, to lay before the Profession regularly, a selection of Cases from the American and English Reports, as they issue from the press, of the charaeter stated; which, according to their importance, will be either printod in full, or earefully condens:d. And arrangements have been also made with Judges and Professional gentlemen in various parts of the Union, by means of which *manuscript opinions* will be constantly furnished to the Law Register soon after they are read, and long before they can be elsewhere reported.

Eaeh number of the Law Register will eontain in general, one or more short Essays on Legal Topics, of direct and immediate interest, under which the subject of Medical Jurisprudence will be comprehended; a Collection of recent American Cases in the Federal and State Courts; recent English Cases, with referenee to the American authorities; Cases from the American Reports, in full; Notes or Abstracts of Cases containing *new points;* Miseellaneous legal information; and Critical notices of New Books.

The English Continental Law Journals and Reviews will be regularly received, whence information on Professional subjects will be extracted; and where they are of a nature to justify it, Essays and Artieles on general Jurisprudence will be reprinted or translated from them. A seleeted list of the Legal Publications in Europe, and in the United States, will be furnished to subseribers quarterly.

No pains or expense will be spared by the Proprietor in endeavouring to render the Law Register of value to the Profession.

The American Law Register will be edited by Messrs. Asa I. Fish and Henry Wharton, of the Philadelphia Bar, who will be aided in their labours by assistant Editors in New York and Boston. It will be printed in royal oetavo form. Each number will contain sixty-four pages, making a volume of over seven hundred and fifty pages, annually, and will be published punctually, the first of every month.

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THE

AMERICAN LAW REGISTER.

FEBRUARY, 1853.

THE LATE HONORABLE JOHN SERGEANT,

OF PHILADELPHIA.

It is our duty to record the death of this distinguished member of the bar. He died at his residence in the city of Philadelphia, on the 23d day of November, 1852, in the seventy-third year of his age, beloved, honored and revered; after a long life of usefulness and distinction, which had been devoted to his profession and his country. It is not probable that under changed and still changing circumstances, such a man can be again looked for in this country. The habits of society, the rigid demands of the profession and (perhaps we might say) its lowered tone of feeling, tend to forbid this expectation, unless some radical change should take place. It is believed that no statesman except John Sergeant, has obtained a position in the halls of Congress by the side of Lowndes, Calhoun, Clay and Webster, and at the same time retained an acknowledged standing at the head of our profession, unsurpassed by any competitor. It might be deemed invidious to enlarge upon this idea. There have been others who have exhibited the same eloquence at the forum as at the capitol; but we are addressing the

profession, and they will recognize the difference between eloquent and occasionally even learned argument, and the ready preparation of the trained lawyer.

Mr. Sergeant was born in this city, at a house, until recently standing in Third street, above New street. He was the second son of Jonathan Dickinson Sergeant, himself a distinguished lawyer, and the first Attorney General of the State of Pennsylvania after the adoption of the new constitution in 1799, an ardent whig of the Revolution, and a member of the Congress of 1777. He was one of the Committee of Public Safety, who volunteered to aid and minister to the destitute sick in the pestilence of 1793, and after an eminent but short professional career, fell a victim to the cause of humanity in performing his duties as a member of that committee.

Mr. Sergeant, after graduating at Princeton College in the year 1795, entered the counting-house of the Messrs. Perot, eminent merchants of this city, and for whom he entertained great respect until the close of his life. This occupation, however, did not suit his temperament. His mind was too self-reflective, and required the exercise of intellectual struggles and scientific pursuits. He gave up mercantile avocations, and entered the office of the late Jared Ingersoll, as a student of law, and was admitted to the bar of the Court of Common Pleas of this county, in July, 1799, at the age of 19 years and 7 months.

His success at the bar was rapid and great. Full professional employment met him at once: and he continued, with the intervals devoted to public service, in the pursuit of his profession down to the close of the year 1850, a period of labor which very few lawyers have been able to endure.

While yet a young man, he was offered by Governor McKean, the recordership of the City of Philadelphia, a post of honor and profit, then generally held by distinguished lawyers who at the same time continued to pursue their profession. It was certainly an honor of no mean nature, to be selected at an early age by so eminent a lawyer as Governor McKean, to fill an office lately held by the distinguished Alexander James Dallas.

In 1805 and 1807, Mr. Sergeant was a member of the Legislature of Pennsylvania, for the city of Philadelphia, and in 1815 he began his congressional career, being elected as the representative of the District then composed of the City and County of Philadelphia, and the County of Delaware, in the place of General Williams, who had died after his election. He continued in the House of Representatives until the year 1821, when he declined a re-election, and retired to private life. For the last session (of 1820 and 1821,) Mr. Sergeant was returned without opposition, by a vote of above twelve thousand.

In 1826, he was appointed Minister from the United States, to meet the Plenipotentiaries then expected to assemble at Tacubaya, in Mexico. This Congress, however, as is well known, did not meet, on account of the disturbances which occurred in South America, and Mr. Sergeant returned to the United States in July, 1827. In the following October he was sent to Congress by the City of Philadelphia for one year, after which he again retired to private life. We find him, however, once more in the halls of the National Legislature in 1840 and 1841, as a representative of the City of Philadelphia; but after the close of this session he declined serving the public any longer in that capacity. On General Harrison's election to the office of President of the United States, he was offered a place in the Cabinet, but refused the appointment; and shortly afterwards declined the offer of President Tyler, of the mission to Great Britain. In 1838, he presided over the convention to alter the Constitution of this State; and in 1832 he was the Whig candidate for the Vice-Presidency of the United States, Mr. Clay being the Whig candidate for the Presidency at the same time. The last public duty which he performed was in 1847, when he was appointed on the part of the United States, by Mr. Marcy, then Secretary of War, with the entire concurrence of President Polk, to settle and determine the differences existing as to the Pea Patch; to which appointment the States of Delaware and New Jersey assented, presenting a remarkable instance of the universal confidence in the ability and integrity of Mr. Sergeant, and thus affording the means of settling a question which might have been productive of serious difficulty.

In this case the United States claiming the "Pea Patch," had a decision in their favor in the Circuit Court of the United States, for the District of Delaware; the Claimants in opposition, under the State of New Jersey had had similar success in the District of New Jersey; and neither party was willing to consider itself defeated, nor to carry the case to the Supreme Court of the United States.

In 1851, Mr. Sergeant presided at the meeting held in this City, to express the sentiments of the citizens of Philadelphia, of all parties, on the subject of the preservation of the union of these United States. This was his last appearance in public, and was a fitting conclusion to his public life.

On the death of Judge Baldwin, President Tyler offered Mr. Sergeant a seat on the Bench of the Supreme Court of the United States. This honor, however, he respectfully declined, on the ground that he was then past sixty years of age: but wishing the appointment tendered to a friend, he desired that the offer to him, and his refusal of it, should not be made known.

Mr. Sergeant, for a period of some thirty-five years, had perhaps as extensive a practice as any one before the Supreme Court of the United States, and the members of that Bench never failed to perceive and acknowledge his extraordinary powers. One of them recently said that his briefs were the best prepared of those presented to the Court, and in the reports of his arguments in Wheaton, Peters and Howard, the profession will find a record of Mr. Sergeant's labors, learning and mind.

As an advocate, and especially before a jury, it is believed that Mr. Sergeant has never been surpassed by any one at this bar. With a quick perception, great inventive powers, and a ready wit, accompanied where proper with withering sarcasm, few could cope with him. He had, besides, great command of pure Saxon English. His language was plain and readily understood by the uninstructed, as well as by others. His manner was animated,—his eye piercing,—and his voice of extraordinary compass and power. To all these qualities he added an excellent elocution. Probably the last exhibition of these qualities which he made, was in the

District Court of the United States for this district, in the case of *The United States* v. *James W. Hale*, involving the discussion of the question of private mails, in the year 1844. Those who heard him, will never forget his manner and gesticulation. Mr. Sergeant possessed great quickness of observation of men and things. If any one passed him, he caught in an instant, without the appearance of any attention, every peculiarity of the person before him. His master in rhetoric and elocution was Quintilian. He read and studied again and again the work of that celebrated orator. The copy which he used,—but not now to be found,—belonged to the late Judge William Bradford, and bore the marks in manuscript, of the profound study of it by the latter.

We have alluded to the standing of Mr. Sergeant, as a lawyer, with the Supreme Court of the United States. Here, in our own State, it was no less. Governor (Chief Justice) McKean's estimate of him, we have already referred to. At the request of Chief Justice Tilghman, Mr. Sergeant received the son-in-law of the former as a student of law in his office.

For the twenty years which formed the corporate existence of the second Bank of the United States, Mr. Sergeant was its counsel. His advice must have been sought and given on points and questions every day arising to an immense extent, upon a vast variety of subjects, often upon the spur of the occasion, and without time for mature consideration; and yet it was remarked by the officer of that institution, who had the most frequent occasion to consult him, and who was conversant with almost all the legal questions and difficulties which the business of that bank presented, that he never knew him to err in the slightest degree on a single point; a test of professional learning, quickness and judgment, to which few others could have been subjected with the same result.

In these remarks, we have confined ourselves to Mr. Sergeant, as the lawyer. As a statesman, his character is before the nation, and his reputation is spread everywhere throughout the union. Some of his congressional, and many of his public addresses on different occasions, have been printed. To them we need not refer.

Mr. Sergeant's professional success was of course accompanied by its usual reward, and his heart and his purse were open to every call of philanthropy and charity, and his gifts must have been to an extent at the time, and even yet, unknown to us. He in fact met every appeal promptly, cheerfully and generously.

Mr. Sergeant's moral worth and rectitude were of an exalted character. He was a man of truth in the highest sense of the term. But he was more,—he was an humble, pious Christian, and his religious faith he applied to his every-day duties; to use his own language, when referring to such matters:—"In such matters, however, as I have often remarked to you, our judgment is feeble and imperfect. We can see but a little way, and that indistinctly. A conscientious effort to do our duty, with a disposition at all times submissive to Him, who rules the universe, and a continual sense of his presence, afford the best security for good conduct and the tranquillity it inspires."

RECENT AMERICAN DECISIONS.

Circuit Court of the United States for the Third Circuit. October Sessions, 1839.

SAMUEL MILLER, JUNIOR, *vs.* ARCHIBALD McELROY.[1]

1. Whether an author who gives his work to the public, by printing and publishing it in a newspaper, not protected by any copy-right, can have such a right in the same work by afterwards publishing it in a different form, as in a volume or book.—*Qu.*

2. Whether the deposite of a title page in the clerk's office, when the work it was intended for was not then printed, nor written, nor the manuscript prepared for printing and publication, although the notes or materials from which the work or

[1] The editors of the Law. Reg. are indebted to Wm. H. Crabbe, Esq., of the Philadelphia Bar, for the report of this case.

book was to be, and afterwards was composed, were then in the hands of the author, will entitle him to the copy-right of the work so afterwards prepared and composed.—*Qu.*

3. If the right exists under the circumstances stated in the first and second queries, then, whether one can be charged with an infringement of this right if he has, in fact, never seen or copied from the book so entered and secured, or in any manner used it in his publication, but has reprinted the whole from a public newspaper, unprotected by copy-right, in which he found it, and where the author himself had published it.—*Qu.*

4. Whether the fact of it being stated in some of the newspapers publishing as aforesaid, that the author had secured a copy-right, can in any way help him.—*Qu.*

5. Where there is a reasonable doubt as to the existence of a copy-right, an injunction will not be granted to stay its infringement.

This was a motion for an injunction in a copy-right case.

The complainant's bill alleged that a certain action of *quo warranto* was tried in March and April, 1839, in the Supreme Court of Pennsylvania, at Philadelphia, that complainant took notes of the proceedings therein, and subsequently prepared a full and authentic report of the case, containing the speeches of counsel, the testimony, the charge to the jury, &c., together with original explanatory notes and remarks; that he afterwards published this report, in one volume, under the title "Report of the Presbyterian Church Case: The Commonwealth of Pennsylvania, at the suggestion of James Todd and others, *vs.* Ashbel Green and others;" that said work was prepared chiefly from his own notes, though partly from other materials, and that he was the author and proprietor thereof, within the intention and meaning of the Act of Congress, that he caused a printed copy of the title, in the words, "Report of the Presbyterian Church case: The Commonwealth of Pennsylvania, *ex relatione* James Todd and others, *vs.* Ashbel Green and others, by a member of the Philadelphia Bar," to be duly deposited in conformity with said act, and had complied with all the other requisites thereof; that respondent had, since the publication of complainant's work, caused to be published and sold in Philadelphia a work under the title of "The Case of the General Assembly of the Presbyterian Church in the United States of

America, before the Supreme Court of the Commonwealth of Pennsylvania, impartially reported by disinterested stenographers; including all the proceedings, testimony and arguments at *nisi prius*, and before the court in *banc*, with the charge of Judge Rogers, the verdict of the jury, and the opinion of Chief Justice Gibson," and that certain large parts of said work, then referred to, were nearly like the corresponding parts of complainant's work—so nearly like that respondent must have copied them, more or less literally, from the latter; that a great portion of respondent's work was printed before complainant had published his, but that the parts mentioned were copied from complainant's work, before the whole of it had been printed and published, to wit, either from a paper book prepared for the use of the counsel in the case by complainant, and printed after he had secured his copy-right, but never published, or from a certain weekly newspaper—"The Presbyterian"—published in Philadelphia, in which, by the mere verbal permission of complainant, certain parts of his work were published, after he had secured his copy-right, but not without public notice of said copy-right in said newspaper, or else from some other copy of the work unknown to complainant; and the bill prayed for an injunction, delivery and account, waiving the benefit of the penalty inflicted by the Act of Congress.

The respondent answered that he had published and sold a work entitled as in the bill alleged, but that it was not true that any part of said work was copied from the alleged work of complainant; that the parts mentioned in the bill were not so copied, but were wholly and entirely furnished to respondent by Isaac E. Lamborn, a stenographer, who had no connexion with complainant, and was not employed or paid by him; that complainant did not duly deposite a copy of the title-page of his alleged work, but that the paper deposited was a copy of a title page differing from that of said work, and that no copy of the work of which the title page was deposited was ever so deposited; and that complainant's work was not made use of in the preparation of the respondent's.

A general replication was filed, and the complainant moved for an injunction, &c., in accordance with the prayer of the bill. The

motion was argued on the 17th September, 1839, before Judge HOPKINSON, by

Miller, for Complainant, and

Perkins, for Respondent.

Miller, for the motion.—Does the bill show a good ground for an injunction? Such a report is undoubtedly a proper subject for copy-right. Blackstone says that sentiment and language are the subject of copy-right. The material of this work probably could not be claimed exclusively by complainant, but when he has applied thereto his learning, talents, skill and industry, no one has a right to use the product. *Wyatt* v. *Barnard*, 3 Ves. & B. 78; Eden, 329, 323. *Burfield* v. *Nicholson*, 2 Sim. & St. 1. The bill shows that complainant secured his right, and that the respondent has violated it. These essential facts shown, we are entitled to the injunction.

Perkins, against the motion.—The party asking the interposition of this high power must show that he has complied with all the provisions of the law. *Ewer* v. *Coxe*, 4 W. C. C. R. 487; Godson on patents, 366; Act of 3d February, 1831, § 4 (4 Story's Laws, 22, 21). The title page of the book published has never been deposited up to this time. The bill itself shows that the title deposited was "Report of the Presbyterian Church Case: The Commonwealth of Pennsylvania, *ex relatione* James Todd and others, *vs.* Ashbel Green and others. By a member of the Philadelphia Bar," while the title of the book published was simply "Report of the Presbyterian Church Case: the Commonwealth of Pennsylvania, at the suggestion of James Todd and others, *vs.* Ashbel Green and others." Again, the bill is argumentative, asserting the words to be so nearly alike that they must have been copied, and not positively asserting that one was copied from the other. It is natural and reasonable that, being reports of the same transactions, they should be nearly alike; they ought to be so. It is an analogous case to that of interest tables, which every one must calculate for himself, but which must all agree. As to the paper books, they were not used in the preparation of respondent's report; but if they were they could not be subjects of copy-right, being part of the records

of the Supreme Court of Pennsylvania. *Dodsley* v. *Kinnersley*, Ambl. 403; *Wheaton* v. *Peters*, 8 Pet. 654. Where, by the conduct of the party, as by allowing others to publish his work, the state of things he complains of has been created the injunction will not issue. *Saunders* v. *Smith*, Am. Jurist, vol. 21, No. 41, pp. 221, 227. This complainant published, or allowed others to publish his work in the Presbyterian.

On the 23d September, 1839, Judge HOPKINSON delivered the following opinion in the case:

An action was tried a few months since in the courts of Pennsylvania, in which that Commonwealth, at the suggestion of James Todd and others, was plaintiff, and Ashbel Green and others defendants. From the nature of the controversy, the importance of the judgment that might be rendered, and the number and respectability of the persons interested in it, the trial produced an extraordinary excitement. The parties were respectively desirous to have a report of the trial for publication; and persons were accordingly employed, by each of them, to make a report of the proceedings before the court. These reports were published a short time since, each in an octavo volume, within two or three days of each other. If both are true and faithful, they cannot substantially differ from each other, as they both profess to give an account of the same proceedings. The report made on the part of the defendants was prepared by this complainant; the other was made, or published, by Archibald McElroy. The bill, among other things, prays that an injunction may issue from this court against the respondent, to restrain him from printing, publishing, selling, or otherwise disposing of the parts of his said book, which complainant charges to be for the most part very nearly in the same words, or of the same purport and effect as certain parts of the work or report printed and published by the complainant, who alleges it to be absolutely impossible that the said parts of the work so published by the respondent should be so nearly in the same words, or of the same purport and effect, as the said parts of the complainant's work, if the former had been prepared from original

notes taken by the said respondent, and had not been copied more or less literally from the complainant. The affidavit which accompanies the bill repeats and reaffirms these allegations.

On the 23d day of last March the complainant entered in the clerk's office of the District Court of the United States the title of his book, as follows: "Report of the Presbyterian Church Case: The Commonwealth of Pennsylvania, *ex relatione* James Todd and others, *vs.* Ashbel Green and others. By a member of the Philadelphia Bar." It is agreed that the verdict of the jury was rendered on the 26th March. At the time when this title-page was deposited with the clerk the book was not printed, nor was the manuscript arranged or prepared for printing and publication, although the materials were in the hands of the author and reporter, the complainant. The publication was not made for several months after, as has been already stated.

In addition to these facts it appeared, further, that some months before the publication of the complainant's book he had printed several copies of certain parts of it as a paper book, for the use of the counsel who argued the motion for a new trial, and of the judges before whom that motion was argued, but that these copies were printed after the complainant had deposited the title of his book in the clerk's office; that these paper books were never published or exposed to sale by the complainant, or by any one on his account, or by his permission or order, but that such publication and sale were by him strictly prohibited. It is also stated or agreed that the whole of the contents of the volume or book of the complainant, with those parts of it now charged to have been taken from him by the respondent, were printed and published in a certain weekly paper, published in the city of Philadelphia, by William S. Martien, entitled "The Presbyterian," in eleven successive numbers, by the verbal permission of the complainant; which publication was also made after the title of the book had been deposited in the clerk's office, but a considerable time before the printing and publishing of the book. It is alleged that the parts of the work of the respondent complained of were taken from these paper books or newspapers; but no allegation is made that any parts of the said book or report of

the respondent were taken or copied from the book of the complainant, the title-page of which he had deposited in the clerk's office; nor that the said book was in any manner used by the respondent in making his report. Indeed, it could not be so, as the two books were published almost simultaneously. The complainant avers distinctly that the parts of the respondent's report which are claimed to be the work and property of the complainant were taken from certain paper books he had printed for the purposes mentioned, and from certain public newspapers in which his report had been published with his consent.

Putting, for the present, the paper books, printed for a special purpose, and, in some degree, confidentially, out of the case, the publication, by the complainant, of his work in a newspaper, for which there was no copy-right, circulated, probably, in every State of the Union, and the property of every one who paid for it, presents some very important and novel questions. I presume they are so, as neither the industry of the counsel concerned in this argument nor my own research, has found any judicial answer to them. They are:

Whether an author who gives his work to the public, by printing and publishing it in a public newspaper, not protected by any copy-right, can have such a right in the same work by afterwards publishing it in a different form, as in a volume or book?

Whether an author, by depositing a title-page in the clerk's office, when the work it is intended for is not then printed, nor written, nor the manuscript prepared for printing and publication, although the notes or materials from which the work or book is to be, and, afterwards, actually is, composed, are then in the hands of the author, may have a copy-right of the work so afterwards prepared and composed, by affixing it to the title-page so deposited?

Supposing the two previous questions to be answered affirmatively, that the book so secured by depositing the title-page as aforesaid is protected from violation, and that no man can reprint and publish it, or any part of it, without the permission of the author, yet the question remains whether one can be charged with an infringement upon this right, if he has, in fact, never seen or copied from the

book so entered and secured, or in any manner used it in his publication, but has reprinted the same matter, in part or whole, from a public newspaper in which he found it, where the author had himself published it, and in which paper neither the author nor any other had any copy-right? and,

Whether the notice, given in some of the papers of the copy-right, as stated by the affidavit, can help the complainant?

These are grave questions not to be decided on a preliminary inquiry and argument, but to be left, without prejudice, to the full and final hearing of the case. If, on that hearing, the complainant shall sustain his case and complaint, he will recover a judgment to compensate him for the wrong he has suffered, and I have no reason to believe the respondent will not be able to answer it. In the case of *Ogle* v. *Ege*, 4 Wash. C. C. R. 584, Judge WASHINGTON said, on a prayer for an injunction, that if there appears a reasonable doubt as to the plaintiff's right, or the validity of his patent, the court will require him to try his title at law.

Other questions were raised on this argument, such as that the title of the book is not the same as that deposited in the office, and that the affidavit is not direct but argumentative. These it is unnecessary for me to notice at this time. It is my desire and intention to keep myself as free and open upon all the points that may hereafter be presented to my judgment in this case. Were I to grant the injunction I should decide the questions I have stated, as well as others, affirmatively for the complainant. This I am not now prepared to do, whatever may be my opinion hereafter. The parties will come to the final hearing on their respective rights without a prejudication of any one of them.

The injunction is refused.

In Supreme Court of the United States, December, 1852. *Writ of Error to the Supreme Court of Illinois.*

MOORE, EXECUTOR OF EELLS, PLAINTIFF IN ERROR, *vs.* THE PEOPLE OF THE STATE OF ILLINOIS.

1. A State may by virtue of its general police power, repel from its borders an unacceptable population, whether paupers, criminals, fugitives, or liberated slaves, and may hence punish her own citizens who thwart this policy of expulsion by assisting such fugitives.
2. The Illinois act is not the same as the Act of Congress of February 12, 1793—section 4.
3. A man may by the same act, commit two offences against two different sovereignties, and may hence be punished by both, but this is not a double punishment for the same offence.
4. Prigg *v.* Pennsylvania, 16 Peters, 540, commented on and points restated.

The opinion of the Court was delivered by

GRIER, J.—The plaintiff in error was indicted and convicted under the criminal code of Illinois, for "harboring and secreting a negro slave." The record was removed by writ of error, to the Supreme Court of that State; and it was there contended on behalf of the plaintiff in error, that the judgment and conviction should be reversed, because the statute of Illinois, upon which the indictment was founded, is void, by reason of its being in conflict with that article of the constitution of the United States, which declares "that no person held to labor or service in one State under the laws thereof, escaping into another, shall in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such labor may be due," and also because said statute is in conflict with the Act of Congress on the same subject.

That this record presents a case of which this court has jurisdiction under the 25th section of the Judiciary Act, is not disputed.

The statute of Illinois, whose validity is called in question, is contained in the 149th section of the criminal code, and is as follows: "if any person shall harbor or secrete any negro, mulatto,

or person of color, the same being a slave or servant owing service or labor to any other persons, whether they reside in this State or in any other State or territory or district, within the limits and under the jurisdiction of the United States, or shall in any wise hinder or prevent the lawful owner or owners of such slaves or servants, from retaking them in a lawful manner, every such person so offending, shall be deemed guilty of a misdemeanor, and fined not exceeding five hundred dollars, or imprisoned not exceeding six months."

The bill of indictment framed under this statute, contains four counts:

The 1st charges that "Richard Eells, a certain negro slave owing service to one C. D., of the State of Missouri, did unlawfully *secrete*, contrary to the form of the statute," &c.

2d. That he "*harbored*" the same.

3d. For unlawfully secreting a negro owing labor in the State of Missouri to one C. D., which said negro had secretly fled from said State and from said C. D.

4th. For unlawfully preventing C. D., the lawful owner of said slave, from retaking him in a lawful manner, by secreting the said negro, contrary to the form of the statute, &c.

In view of this section of the criminal code of Illinois, and this indictment founded on it, we are unable to discover anything which conflicts with the provisions of the constitution of the United States, or the legislation of Congress on the subject of fugitives from labor. It does not interfere in any manner, with the owner or claimaint, in the exercise of his right to arrest and recapture his slave. It neither interrupts, delays nor impedes the right of the master to immediate possession. It gives no immunity or protection to the fugitive against the claim of his master. It acts neither on the master nor his slave; on his right or his remedy. It prescribes a rule of conduct for the citizens of Illinois. It is but the exercise of the power which every State is admitted to possess, of defining offences and punishing offenders against its laws. The power to make municipal regulations for the restraint and punishment of crime, for the preservation of the health and morals of her

citizens, and of the public peace, has never been surrendered by the States, or restrained by the Constitution of the United States.

In the exercise of this power, which has been denominated the police power, a State has a right to make it a penal offence to introduce paupers, criminals, or fugitive slaves within its borders and punish those who thwart this policy by harboring, concealing, or secreting such persons. Some of the States coterminous with those who tolerate slavery, have found it necessary to protect themselves against the influx either of liberated or fugitive slaves, and to repel from their soil a population likely to become burdensome and injurious, either as paupers or criminals. Experience has shown also that the results of such conduct as that prohibited by the statute in question are not only to demoralize their citizens who live in daily and open disregard of the duties imposed upon them by the constitution and laws, but to destroy the harmony and kind feelings which should exist between citizens of this Union, to create border feuds and bitter animosities, and to cause breaches of the peace, violent assaults, riots and murder. No one can deny or doubt the right of a State to defend itself against evils of such magnitude, and punish those who perversely persist in conduct which promotes them.

As this statute does not impede the master in the exercise of his rights, so neither does it interfere to aid or assist him, If a State, in the exercise of its legitimate powers in promotion of its policy of excluding an unacceptable population, should thus indirectly benefit the master of a fugitive no one has a right to complain that it has thus far, at least, fulfilled a duty assumed or imposed by its compact as a member of the Union.

But though we are of opinion that such is the character, policy and intention of the statute in question, and that for this reason alone the power of the State to make and enforce such a law cannot be doubted; yet we would not wish it to be inferred by any implication from what we have said, that any legislation of a State to aid and assist the claimant, which does not directly or indirectly delay, impede or frustrate the reclamation of a fugitive, or interfere with the claimant in the prosecution of his other remedies,

is necessarily void. This question has not been before the court, and cannot be decided in anticipation of future cases.

It has been urged that this act is void, as it subjects the delinquent to a double punishment for a single offence. But we think that neither the fact assumed in this proposition, nor the inference from it, will be found to be correct. The offences for which the fourth section of the act of 12th February, 1793, subjects the delinquent to a fine of five hundred dollars, are different in many respects from those defined by the statute of Illinois. The Act of Congress contemplates recapture and reclamation, and punishes those who interfere with the master in the exercise of this right: 1st, by obstructing or hindering the claimant in his endeavors to seize and arrest the fugitive. 2dly, by rescuing the fugitive when arrested; and, 3dly, by harboring or concealing him after notice.

But the act of Illinois having for its object the prevention of the immigration of such persons, punishes the harboring or secreting negro slaves, whether domestic or foreign, and without regard to the masters' desire either to reclaim or abandon them. The fine imposed is not given to the master as the party injured, but to the State, as a penalty for disobedience to its laws. And if the fine inflicted by the Act of Congress had been made recoverable by indictment, the offence, as stated in any one of the counts of the bill before us, would not have supported such an indictment. Even the last count, which charges the plaintiff in error with unlawfully preventing C. D., the lawful owner, from retaking the negro slave, as it does not allege notice, does not describe an offence punishable by the Act of Congress.

But, admitting that the plaintiff in error may be liable to an action under the act of Congress for the same acts of harboring and preventing the owner from retaking his slave, it does not follow that he would be twice punished for the same offence. An offence, in its legal signification, means the transgression of a law. A man may be compelled to make reparation in damages to the injured party, and be liable also to punishment for a breach of the public peace, in consequence of the same act, and may be said, in common parlance, to be twice punished for the same offence. Every citizen

of the United States, is also a citizen of a State or Territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offence or transgression of the laws of both. Thus, an assault upon the Marshal of the United States, and hindering him in the execution of legal process, is a high offence against the United States, for which the perpetrator is liable to punishment; and the same act may be also a gross breach of the peace of the State, a riot, assault or a murder, and subject the same person to a punishment under the state laws for a misdemeanor or felony. That either or both may, (if they see fit,) punish such an offender, cannot be doubted; yet it cannot be truly averred that the offender has been twice punished for the same offence, but only that by one act he has committed two offences, for each of which he is justly punishable. He could not plead the punishment by one, in bar to a conviction by the other. Consequently, this Court has decided, in the case of *Fox* v. *The State of Ohio*, 5 Howard, 432,) that a State may punish the offence of uttering or passing false coin as a cheat or fraud practised on its citizens; and in the case of *The United States* v. *Marigold*, 9 How. 560, that Congress, in the proper exercise of its authority, may punish the same act as an offence against the United States.

It has been urged, in the argument on behalf of the plaintiff in error, that an affirmance of the judgment in this case will conflict with the decision of this Court in the case of *Prigg* v. *The Commonwealth of Pennsylvania*, 16 Peters, 540. This, we think, is a mistake. The questions presented and decided in that case differed entirely from those which affect the present. Prigg, with full power and authority from the owner, had arrested a fugitive slave in Pennsylvania, and taken her to her master in Maryland. For this he was indicted and convicted under a statute of Pennsylvania, making it a felony to take and carry away any negro or mulatto for the purpose of detaining them as slaves.

The following questions were presented by the case and decided by the Court.

1st. That under and in virtue of the Constitution of the United

States, the owner of a slave is clothed with entire authority, in every State in the Union, to seize and recapture his slave wherever he can do it without illegal violence or a breach of the peace.

2d. That the government is clothed with appropriate authority and functions to enforce the delivery on claim of the owner, and has properly exercised it under the act of Congress of 12th February, 1793.

3d. That any State law or regulation which interrupts, impedes, limits, embarrasses, delays or postpones the right of the owner to the immediate possesssion of the slave and the immediate command of his service, is void.

We have, in this case, assumed the correctness of these doctrines, and it will be found, that the grounds on which this case is decided were fully recognised in that. "We entertain," say the Court, (page 625,) "no doubt whatsoever that the States, in virtue of their general police power, possess full jurisdiction to arrest and restrain runaway slaves, and remove them from their borders, and otherwise to secure themselves against their depredations and evil example, as they certainly may do in cases of idlers, vagabonds and paupers. The rights of the owners of fugitive slaves are in no just sense interfered with or regulated by such a course, and in many cases the operations of the police powers, although designed essentially for other purposes, for the protection, safety and peace of the State, may essentially promote and aid the interests of the owners. But such regulations can never be permitted to interfere with, or to obstruct the just rights of the owner to reclaim his slave, derived from the Constitution of the United States, or with the remedies prescribed by Congress to aid and enforce the same."

Upon these grounds we are of opinion that the act of Illinois, upon which this indictment is founded, is constitutional, and therefore affirm the judgment.

Judgment affirmed.

Waldo County Session, Maine, October, 1852.

CHIEF JUSTICE SHEPLEY'S CHARGE TO THE GRAND JURY.

1. The citizen cannot resist by force the execution of process obtained through the tribunals in the regular course of proceedings, although he may consider it to have been unconstitutionally and unjustly obtained; such forcible resistance would render him criminally liable.

2. The citizen is not at liberty to offer the least resistance, by force, to the execution of a law esteemed by himself to be an unauthorized and unconstitutional one, nor may he incite others to do so, even when it acts directly upon his own person or property.

STATEMENT.

The charge to the grand jury was made under the following circumstances:—

Samuel Jewell, by an agreement with the owner, entered upon a lot of uncultivated land about forty years ago; had cleared and cultivated part of it, built a small framed house and barn upon it, and had continued to occupy it until the spring of the year 1851. He had some years before that agreed with the owner to pay him 500 dollars for the land, and had paid $200 in part. He had for a long time neglected to pay any more. He had a son John J. Jewell, who had, with his wife, resided for some years with his father. The owner of the land had commenced suits against both to recover possession of it, and had recovered judgments against them. Writs of *habere facias* had been issued and placed in the hands of an officer for execution, and they had refused, upon his request, to quit the premises. Under these circumstances, one John N. Cousins made an agreement with the owner of the land to purchase it, and he made an attempt, without success, to induce them to leave it, offering them some compensation. Failing to obtain possession, Cousins caused an officer, with the writs, to go to the farm with an armed posse, to remove them from it. The officer informed them that he had such writs, and that it was his duty to remove them

from the land forcibly, if they would not depart peaceably. They refused to leave or to permit him to enter, and barred the doors and fastened the windows. The officer directed his assistants to break in at a door. The attempt was made without success, and a gun was seen to be there presented. He then directed his assistants to cut through the side of the house. They did so, and after an opening had been made a gun was fired through it, and Cousins was thereby killed.

The Jewells had insisted that they had acquired rights by their long-continued possession, and that the judgments against them had been improperly recovered.

CHARGE.

Gentlemen of the Grand Jury:—You may be called in the discharge of your official duties to investigate the circumstances, under which a fellow citizen has been killed, while alleged to have been assisting an officer in the discharge of his official duties. The occasion therefore is not unsuitable, if it does not require, that the principles should be stated, by which men should be governed, when required by the laws of the country, in which they dwell, to do an act or to refrain from doing it.

Obedience to established law is the principle, upon which alone our civil and religious freedom can be maintained.

Much has recently been spoken and written respecting the duty of obedience to human laws, and there has been much of vague statement and of involved and of inconclusive argument, affording no very definite or clear rules easy of comprehension by a whole people, and fitted for application to the common concerns of life. And yet it is believed, that men unlearned in the law and unqualified for legal investigations or for intricate and difficult processes of reasoning, were not intended to be left without rules for their government, which could be readily comprehended and applied.

The offence alluded to, is reported to have been committed while resisting the execution of a judgment rendered by a judicial tribunal.

When a judgment is obtained by one person against another by

a regular and legal course of judicial proceedings, and the person, against whom it has been obtained, considers it to have been illegally or unjustly obtained, he cannot be permitted to offer the least resistance to the execution of it. If the judgment has been obtained against him by false testimony, or by any accident, negligence, or oversight on his own part, it is not the less binding and operative upon him, until he obtains relief from it in the manner prescribed by law; and while it remains in force the least resistance to its execution is unauthorized and illegal, and is liable to be punished in the same manner, that it would be, if the judgment had been rendered without the occurrence of any accident, neglect, or false testimony.

If this were not the rule of law and of duty, every man would be at liberty to resist the regular and constituted administration and execution of the laws; to do that which seemed right in his own eyes; and there would be no security for person or property without resort to an armed force. Our present form of government could exist no longer for any beneficial purpose.

A person may believe, that an Act of the Legislature is unauthorized by the Constitution of the State or of the United States, and the inquiry is presented, whether he should obey it. It will be his first duty to ascertain, if possible, whether there is good reason to believe that his opinion is a correct one. After obtaining the best information within his power, should he continue to be of the same opinion, he may assume the responsibility, disregard the enactment, and abide the consequences. But he must not offer the least forcible resistance to the execution of the law esteemed to be unconstitutional, even when it acts directly upon his own person or property, nor incite or encourage others to do so. He must quietly permit it to operate upon his person or property in the same manner, as he should do, if there were no doubt, that it was a constitutional and valid enactment, and submit to its effect, until by a regular course of legal proceedings he can obtain the decision of a judicial tribunal provided for that purpose, and thus, if the act be decided to be unconstitutional, obtain redress for any injury to

his person, property, or rights, occasioned by the enforcement of the unconstitutional enactment.

He may not under any circumstances resort to force himself or incite others to do so, to prevent the execution of the law by a regular judgment or otherwise by officers appointed for that purpose, although it may finally prove to have been unconstitutional and void.

To allow him to do so would be to permit every man to be the final judge of the constitutionality and validity of the laws, to disturb the public peace by resisting them, and to introduce disorder, violence, and the shedding of blood, upon the judgment and according to the will and pleasure of every man in the community.

The rule of duty is plain. A man may disregard a law, which he believes to be a violation of the constitution and abide the consequences upon his person or property; but he must not offer the least resistance to the regular execution of such a law or incite others to do so, however severely it may act upon his person, property, or rights. He must seek for redress through a regular course of legal proceedings.

A person may believe, that an act of a legislative body legally passed in accordance with the provisions of the constitution, by which it is governed, is contrary to the laws of God. The inquiry is then presented respecting his duty to obey it.

His first duty is to ascertain, whether the act is clearly and directly opposed to the divine law. When this has been ascertained clearly, as when for example such an act should require him to hate and to kill his enemy, while the divine law declares, thou shalt love thine enemies and shalt not kill, the human law is to be disobeyed, and the divine law obeyed. The person is not at liberty to obey the human law. When no commandment or precept in the revealed will of God can be found, which if written under the human law would be clearly opposed to it, it is the duty of the citizen to obey the human law.

It may be, as it has often been, contended that, although no precept of the divine law clearly opposed to the human law can be

found, a person may ascertain certain rules and principles resulting from the whole revealed will of God, and may conclude, that these rules and principles are opposed to a law of the country, and that he is therefore authorized and required to disobey it.

The reasoning, on which this position is based, is unsound; and the position itself is unauthorized by the divine commandments and precepts.

Few persons could be found, who would agree upon all the rules and principles resulting from the whole of the revealed will of God. Such rules and principles would be different when presented by those, who were more or less highly endowed with intellectual power, and by those whose minds were more or less highly cultivated and trained to profound, elaborate, and intricate courses of investigation and deduction; and by those who were more or less under the guidance of a correct moral sense and religious influence, and who were more or less perfectly instructed in the divine precepts. These rules and principles might be as numerous and various as the degrees of mental power, of mental cultivation, and of correct moral and religious instruction.

It could not have been the intention of the divine Instructor to leave men in such a condition, that when called upon to obey the laws of their country, there should be found no certain rule of conduct prescribed by Him, applicable alike to all persons, and so clearly made known that all persons of common capacity, who could read, or comprehend what was read by others, could understand and act upon it. It must have been His intention to communicate a common and plain rule for all classes of persons, or there would be no common and plain rule of duty.

When therefore a person can find no direct and palpable conflict between a divine and human law, he is not at liberty to enter upon an elaborate course of investigation and inquiry, whether a rule cannot be deduced by his scriptural studies and mental operations, as resulting from the whole of the divine precepts, which rule will be in conflict with human laws, and to act upon this rule of his own making.

Rules and principles thus deduced are not of God. They are

the workmanship of man. To pursue such a course is to set up a rule often elaborated from his own pride of intellect and of cultivation, or from self-will, or ignorance, or fanaticism, in place of the divine will, and to make it the foundation of a wilful opposition to the regularly established laws of the country.

It is not intended to deny that such rules may be useful, and may be used to determine the moral duties of man, when those duties are not plainly prescribed by divine or human laws.

When one is required and obliged to disobey a human law, because it is opposed to the plain letter and declaration of the divine law, is he therefore authorized to oppose by force the execution of the human law? Certainly not. It is his duty to disobey calmly and quietly, without the least attempt to resist, or otherwise to oppose the execution of the human law by the officers appointed to execute it. He is simply to disobey it, and to abide the consequences of his disobedience, whatever they may be, without any attempt by force or violence or by inciting others to use it, to prevent the full effect of the penalty, imposed by the human law for its violation, being inflicted upon his person or property.

The duty is plainly inculcated in the Scriptures not to oppose by force or violence the laws of an existing government irrespective of their character. It is one's duty to follow the example of Daniel and refuse to worship Darius, and to follow his example also by submitting to go into the den of lions without any attempt by force or violence to prevent the execution of the law upon himself.

This is not a fit occasion to consider under what circumstances a person may by the divine law be permitted to overthrow an existing government by revolution, and these remarks are not applicable to such a question. Nor are they intended to question the right of every citizen to discuss with entire freedom the character of existing laws, and to show, that they permit or encourage moral misconduct, and that they are otherwise unwise or inexpedient, and that they ought to be altered or repealed.

Some persons attempt to justify their disobedience of human laws by asserting, that they cannot in conscience obey them.

The present occasion is not an appropriate one to consider

whether conscience may not be the best guide for the determination of man's moral duties, where the revealed will of God respecting them is not and cannot be known.

It may be safely asserted, that conscience is not to be relied upon as affording a correct or safe rule of duty for a people, to whom the will of God has been made known.

The revealed will of God constitutes the rule of right and wrong. There can be nothing right, which is opposed to it; nothing wrong, which is in accordance with it.

Man's conscience during all his past history has been frequently and greatly opposed to it.

Men's consciences differ according as their moral and religious and mental instruction has been more or less correct and thorough.

The divine will, as plainly revealed and made known in the Scriptures, has, in the manner already stated, determined man's duty respecting obedience and disobedience of human laws. It is the only perfect rule of duty. No man can be assured, that his own conscience does afford a perfect rule. He, that would substitute for the divine will the conscience of man, or his own conscience, would in effect cast away the christian religion as a rule of duty and unite himself with those who may have no better or safer guide than conscience, often blunted by the indulgence of pride, passion, self-will, and self-interest, darkened by erroneous and prevailing opinions and instructions, and blinded by superstition and fanaticism. He, that would do this, knoweth not what manner of spirit he is of, or he would not attempt to thrust aside the revealed will of God as a rule of duty and to set up his own conscience in its place. It is but an exhibition of self-conceit and of revolting presumption for any man favored with a revelation of the divine will to present his own conscience as affording a more correct and infallible rule of duty than the revealed will of God; or to question the sufficiency of the divine precepts and to attempt to supply their defects by a voice within him.

It is not intended to deny that the conscience of man was given to aid him in the discharge of his moral duties; or that it should be used for that purpose. It should however occupy its proper

position of a monitor to man, to walk in the right ways of the Lord, and it should not exalt itself to the position of a revelator of the divine will. When it attempts to do this, it displaces that revealed will, and usually becomes the revelator of the self-will and perversity of man.

In the Supreme Court of New York.

THE ONEIDA BANK *vs.* BURTON D. HURLBUT.

1. A holder of a bill of exchange payable at a day certain, may present it for acceptance at any time before maturity, and upon refusal of the drawee to accept, may give notice of such refusal to the prior parties, and have an action against them at once.
2. If the holder omit to give notice to the drawer and endorsers, of the refusal of the drawee to accept upon presentment, they will be discharged, unless the bill subsequently come to the hands of a bona fide holder for value, who again presents the bill and duly charges the prior parties.
3. To constitute a valid undertaking as an acceptance, the undertaking must in New York, be in writing, and signed by the acceptor. The writing must indicate that the party sought to be charged as acceptor, intended to take upon himself the obligations, and assume the liabilities of an acceptor.
4. A bill drawn by a manufacturing corporation in the country, upon an individual in New York city, who is the treasurer and financial agent of the company, and presented for acceptance to the drawee, who writes across the face of the bill, "accepted, payable at American Exchange Bank," and signs it "Clayville Mills, by E. C. Hamilton, Treasurer," (Clayville Mills being the drawers,) is not accepted by the drawee.
5. The acceptance is that of the corporation and the indorsers, are entitled to notice of non-acceptance by the drawee, and for want of notice, are discharged from liability to the holder of the bill.

This cause was tried at the Oneida Circuit, without a jury. The facts sufficiently appear in the following opinion:

C. A. Mann, for Plaintiff.

H. Denio, for Defendant.

W. F. ALLEN, Justice.—This action is brought against the de-

fendant as indorser of an inland bill of exchange drawn by the "Clayville Mill," an incorporated company doing business in Oneida county, upon "E. C. Hamilton, New York," at fifty days after date, for five thousand dollars, and indorsed by F. Hollister, the payee, by T. P. Ballou and by the defendant. Before its maturity, the bill was presented by the holder to the drawee, for acceptance, who wrote across its face, "accepted, payable at American Exchange Bank," and signed it "Clayville Mills, by E. C. Hamilton, Treasurer." The holders treated this as an acceptance by the drawee, and gave no notice of non-acceptance to the other parties to the bill. Evidence was given that the drawee was the Treasurer of the "Clayville Mills," and that the bill was drawn on account of the company, that he had no funds in hand belonging to that corporation—that he was not indebted to it—that he was the general financial agent of the company in New York, and the evidence justifies the conclusion that he was authorized to bind the company in any legitimate way, for the payment of the debt represented by the bill. Although the holder of a bill of exchange payable at a day certain, is not bound to present the same to the drawee for acceptance, before its maturity, still he may do so, and upon the refusal of the drawee to accept, cause notice of such refusal to be given to the drawer and indorsers, and have an action against them at once. If the holder omits to give notice of the refusal to accept, the drawer and indorsers will be discharged. *Blesard* vs. *Hirst*, 5 Burr. Rep., 2670; *Goodall* vs. *Dolley*, 1 T. R., 712; *Allen* vs. *Suydam*, 20 Wend. R., 324. *Roscoe* vs. *Hardy*, 12 East., 434; Story on Bills, §§ 228 and 284.

To effect such discharge, the bill must be actually presented for acceptance, and the acceptance refused. It is not sufficient that the holder informs the drawee that he has the bill, and the drawee thereupon tells him that the bill will not be accepted or paid. *Fall River Union Bank* vs. *Willard*, 5 Met., 216. Neither will presentment and refusal without notice, discharge the drawer and indorsers from liability upon the bill in the hands of a subsequent bona fide indorsee for value, who causes the same to be again presented for acceptance, and proper notice of non-acceptance to be

given. *O'Keefe* vs. *Dana*, 6 Taunt. 305; S. C. in error, 5 M. & S., 282. In the case before me, the plaintiffs were the holders of the bill at the time it was presented, and no question is made that it was actually presented for acceptance before maturity—that it was not accepted in any other manner than above stated, and that no notice of non-acceptance was given to the defendant. The only question, therefore, is whether the bill was in truth accepted by the drawee, for if not, the defendant is discharged. The plaintiffs treated the undertaking on the face of the bill, as an acceptance by the drawee, and so aver it to be in their complaint. The question is not, it appears to me, necessarily whether the Clayville Mills are bound by the acceptance. It is quite immaterial whether an obligation has been incurred by a third person. If none was incurred by the drawee, there was no acceptance by him. An acceptance to be valid, must be in writing, (1 R. S., 768, § 6,) and although it is not required to be in any particular form, it must be signed by the acceptor, and it must appear from the written undertaking, that the drawee intended to take upon himself the obligations and assume the liabilities of an acceptor, or at least that by the writing, the holder was induced to believe that the drawee did undertake, as an acceptor, so as to estop him from denying his acceptance thereafter. The signature of the acceptor may be either in the usual form, or may be in characters or cyphers, but it must appear from the writing, when fully understood, that the person sought to be charged as an acceptor, designed by the writing to accept the bill according to its terms. *Brown* vs. *The Butchers' and Drovers' Bank*, 6 Hill, 443; *Palmer* vs. *Stephens*, 1 Den., 471. It is competent in an action between the original parties to a written instrument, for one whose initials or full name appears to the obligation to show that they were placed there to attest the execution of the instrument, or for any other lawful purpose, and not as maker of the instrument. *Palmer* vs. *Stephens*, *Ib.* If the purpose for which a party puts his name upon a paper appears by the form of the instrument or in any other way, upon the face of the writing, there is no necessity of parol evidence to establish the same fact, and if the apparent purpose is to attest the execution by a third person or

some other legitimate purpose, and not as maker, the burthen of proof will be upon the holder of the writing, (if such proof should be competent,) to show that the name was put there with intent to create an obligation as a party.

The question in this case would have been different, had Hamilton merely written his name across the bill, adding thereto the word "Treasurer," or "Treasurer of the Clayville Mills." It might then have been said that the addition was a description of the person, a mere memorandum not affecting his liability to the holder of the bill. At least it might well be said to be equivocal, and therefore to be taken most strongly against the party thus signing his name. Although by such signature to a promissory note given for the benefit of the corporation, it might be bound as maker, it is more questionable whether an acceptance in that form would not be the acceptance of the drawee individually, and not of the corporation.

But here the act of the drawee is by no means equivocal. He has declared as plainly as he could do, that he did not intend to accept the bill individually, and become bound as acceptor. It is true his name is signed to the acceptance, but simply as the agent of the Clayville Mills, and to attest the execution by that company, to show that he, as the amanuensis of the company, wrote the corporate name to the acceptance. Had the acceptance been under the corporate seal of the company, and the drawee's name had not appeared upon the paper, he could not have been charged as acceptor, although he might have affixed the seal. The act relied upon as an acceptance, is upon its face the act of the company, and not of the drawee. There is nothing by which the holder had a right to infer that the drawee intended to bind himself as acceptor of the bill. It is not enough that the drawee should write the word "accepted," across the bill; it must be signed by him. This is not so signed; it is signed by the Clayville Mills. The acceptance is no more signed by the drawee, than it would have been had some third person signed as acceptor, and Hamilton had at the request of the holder, written his name on the margin or underneath, expressing in words that he did so to attest the signature of

such third person, and for no other purpose. By writing his own name, he has merely certified that he signed the name of the "Clayville Mills" by the procurement of that company. It is as if he had said after signing the name of the corporation to the obligation, "I certify that I signed the name of the 'Clayville Mills' to this acceptance, as the Treasurer and agent of that company, and that I have full authority to do so, and by such act to bind the company." This is quite different from saying "I accept this bill," and signing it individually. The language in each case is equally plain. In the one, it is an acceptance by the drawee, and in the other, it is not. The bill was not accepted by the drawee, and if the acceptance is not that of the "Clayville Mills," it was accepted by no one, and the defendant is discharged for want of notice of non-acceptance by the drawee.

A question was made upon the liability of the Clayville Mills upon the acceptance. In the view I take of the case it is quite immaterial whether that company is bound or not. If the drawee did not accept the bill when it was presented for acceptance, the defendant, as endorser, was entitled to notice of the non-acceptance; and such notice not having been given, he is discharged. But it is said that Hamilton, having undertaken to act for and bind the corporation of which he was treasurer; if he has failed to do so, he may be charged as acceptor in the place of the party for whom he professed to act. I think this proposition cannot be sustained, but for all the purposes of this case it may be assumed to be true, without at all affecting the result.

It is quite material whether Hamilton's liability is as acceptor, or by reason of his undertaking to accept for another and failing to bind that other for want of authority or for any other reason. The undertaking of the defendant was that the drawee should accept the bill when presented, and not that he would commit no fraud upon the holder. If he refused to accept, the endorser was entitled to notice. An ineffectual attempt to bind another person, which should subject the drawee to a liability, would not be equivalent to an acceptance in form by him. The agent, in acting for his principal, undertakes, for the truth of his representations as to his authority,

and while in this State he may in some cases be made liable as upon a contract made by himself, still the fraud and misrepresentation is the gist and foundation of the action. In England and Massachusetts, and some other States, the action against the agent must be by special action on the case. 3 Barn. & Ald. 114; 11 Mass. 97; 16 ibid. 461; 11 S. & R. 129; 3 Johns. Cas. 70; 13 Johns. Rep. 307; 7 Wend. 315; ibid. 106; 2 Greenl. R. 358.

The ground of recovery against the professed agent in a case like this would be that he had not given the holder the valid acceptance of a third person, which he had undertaken to do. His liability would not be that of drawee and acceptor, but would be that which, as agent of the Clayville Mills, he undertook to assume on behalf of that corporation; that is, as an acceptor for honor, or a collateral acceptor. Suppose that when the bill was presented Hamilton, instead of accepting the bill, had delivered to the holder the promissory note of a third person, guaranteeing its payment. He would, by this absolute guaranty, have become bound for the payment of the amount specified in the bill, but not as acceptor, or in a way to excuse notice of non-acceptance of the bill to drawer and endorsers. The note and its guarantee would have been collateral to the bill. In this case, the defendant never undertook that the Clayville Mills should accept or that Hamilton had authority to act for them in the premises.

Again, the liability of Hamilton upon this branch of the case is sought to be established not by want of authority to act as agent for the Clayville Mills, and to bind them in a legitimate form for the payment of the sum named in the bill, but for the reason that the form of the undertaking is such that the company could not be bound by it under the circumstances; in other words, that no one can become liable as acceptor, except the drawee, or one who accepts *supra protest* for the honor of the drawer or some other party, and that the Clayville Mills were neither drawers or acceptors for honor. It is sufficient to say in answer to this, that the circumstances of the case and the form of the undertaking were known to the holder of the bill, and that he received the acceptance, such as it was, with full knowledge of all

the facts which could affect the liability of the nominal acceptor, and as there was no fraud on the part of Hamilton, so no liability was recovered by him. An agent is only bound for the truth of his representation as to his agency. If he has authority to do what he professes to do, he is absolved from liability. The parties agreed upon the form of the undertaking of the Clayville Mills, and if it is ineffectual to bind them, there is no reason why the loss should fall on Hamilton. The cases cited and relied upon by the counsel for the plaintiffs are cases of want of authority, in fact, to act for the principal, or in which the agent had, by the form of his execution of the power, bound himself, as in *White* v. *Skinner*, 13 John. Rep. 315; *Meech* v. *Smith*, 7 W. R. 315; *Dusenbury* v. *Ellis*, 3 J. Cases, 70; 1 Denio, 471, and need not be examined in detail. So, whether the acceptance by the Clayville Mills was an acceptance for honor, binding them, is not material. If it was, then, it not being the acceptance of the drawee, the defendant is discharged, and if it was not, the defendant is nevertheless discharged, if I am right in my conclusions, that it was not the acceptance of the drawee. It would not follow that it was the acceptance of the drawee because it was not that of the corporation of which he was the agent. Perhaps the acceptance may be a valid acceptance for honor, and obligatory upon the acceptors as such, and I am inclined to think it is so for the following reasons. An acceptance *supra protest* may be made for the honor of the drawer or endorser or drawee of the bill, upon payment by the acceptor for honor, he has recourse to the party for whose honor it is accepted, and all prior parties. Story on Bills, § 221 and Seq. A general acceptance *supra protest* will be held to be for the honor of the drawer. Ch. on Bills, ch. 8, § 3; p. 377, ed. of 1833. It cannot be accepted for honor until after dishonor by the drawee, and, in the language of the books a protest for non-acceptance is necessary and should precede the collateral acceptance or payment. 3 Kent's Com. 87. A protest is strictly applicable to foreign bills only, and has no proper application to inland bills of exchange. Story on Bills, § 281, note 3. But a demand of acceptance, or payment of an inland bill, with notice of dishonor to the proper parties, an-

swers the purpose of a protest of a foreign bill, and this should precede an acceptance or payment for honor to the end that the acceptor for honor may have his recourse even against the parties liable to him. The holder of the bill undertakes to the acceptor for honor that he has done everything necessary to charge the parties to the bill, who should, in case of payment, be liable even to him. Without examining this question at length, I think this is the result of the authorities, and this the object of the protest. *Scofield* v. *Bayard*, 3 W. R. 488; *Williams* v. *Germaine*, 7 Barn. & Cress. 468; *Hoan* v. *Caymon*, 16 East, 391, and the case from Lutw. edited by Lord Ellenburgh; Chitty on Bills, ch. 8, § 3; *Barry* v. *Clark*, 19 Pick. 220. There is no evidence that notice of non-acceptance was given to the drawer and endorsers upon the acceptance by the Clayville Mills. On the contrary, it is conceded that such notice was not given to the endorsers. It is, however, proved that the drawer had no funds in the hands of the drawee, so that notice was not necessary to charge the drawer. *Com. Bank of Albany* v. *Hughes*, 17 W. R. 94; *Dollful* v. *Frosch*, 1 Den. 367. The bill was drawn by the Clayville Mills, who became also the acceptors. They knew they had no funds in the hands of the drawee, and were primarily liable for its payment; and upon payment by them they could have no recourse to the endorsers. They therefore lost nothing for want of notice of non-acceptance to the endorsers. *Gowan* v. *Jackson*, 20 Johns. 176. They accepted for their own honor, and as drawers and acceptors had notice of the non-acceptance by the drawee, I see not why, upon principle, it is not a good acceptance. Again, it may be that if the Clayville Mills are not liable as technical acceptors for honor; they are liable as upon an absolute undertaking by their acceptance to pay the bill. They are the drawers of the bill without funds in the hands of the drawee, and after its dishonor had presumed absolutely to pay it according to its terms. They may well be bound by such an acceptance, when a stranger would not be bound. But waiving the further consideration of all other questions, the defendant is, I think, entitled to judgment by reason of the refusal of the drawee

to accept and the omission of the holder to give notice of non-acceptance to the defendant.

Judgment accordingly.

Affirmed on appeal by the court in *banc*.

ALLEN, HUBBARD and PRATT, JJ.

Supreme Court of Pennsylvania, May, 1852.

SCHRIVER ET AL. *vs.* MEYER.

A testator, by his will, proved in 1829, devised as follows: "*Principally and first* of all, I commend my soul into the hands of Almighty God who gave it, and my body to the earth, to be buried in a decent and Christian like manner, at the discretion of my executors hereinafter named, and as to such worldly estate wherewith it has pleased God to bless me in this life, I give and dispose of the same in the following manner, to wit: *Item*, it is my will, and I order and direct that all my just debts and funeral expenses shall be first paid and satisfied. *Item*, it is my will, and I give, devise and bequeath unto my beloved wife, Elizabeth, eighty-five acres, and allowance of land of my dwelling plantation, whereon I now live, situate in Springgarden township, in the county aforesaid, she to have the choice of the same wherever she thinks proper; and further, I do give and bequeath unto my said wife, all my moveable property or personal estate, of what kind or nature the same may be, together with all the monies due me, by bond, note or book account, to and for her only proper use and behoof whatever. *Item*, it is further my will, that my brother and sisters divide the residue of my said plantation amongst themselves, share and share alike.

Held, that the introductory words might be brought down to interpret the subsequent devise to the wife, and that they enlarged it into a fee. Weidman *vs.* Maish, 4 Harris, 504, overruled. GIBSON, J., *dissenting*. BLACK, C. J., *also dissented*.

Error to the Common Pleas of York County.

John Meyer, of York County, Pennsylvania, on the 2d of September, 1827, made his will in the following words:

In the name of God, amen, I John Meyer, of Springgarden township, in the County of York and State of Pennsylvania, farmer,

being weak in body but of sound mind, memory and understanding, blessed be God for the same; but, considering the uncertainty of this transitory life, do make and publish this my last will and testament, in manner and form following, to wit: Principally and first of all I commend my soul into the hands of Almighty God, who gave it, and my body to the earth, to be buried in a decent and christian like manner, at the discretion of my executors hereinafter named; and as to such worldly estate wherewith it has pleased God to bless me in this life, I give and dispose of the same in the following manner, to wit: Item it is my will, and I order and direct that all my just debts and funeral expenses shall be first paid and satisfied; item, it is my will, and I give, devise and bequeath unto my beloved wife, *Elizabeth*, eighty-five acres, and allowance of land of my dwelling plantation, whereon I now live, situate in Spring-garden township, in the county aforesaid, she to have the choice of the same wherever she thinks proper; and further, I do give and bequeath unto my said wife, all my moveable property or personal estate, of what kind or nature the same may be, together with all the monies due me, by bond, note or book account, to and for her only proper use and behoof whatever. Item, it is further my will, that my brother and sisters divide the residue of my said plantation amongst themselves, share and share alike; and lastly, I nominate and appoint my beloved friends, Michael Schriver and John Lefever, of the township aforesaid, to be the executors of this my last will and testament, hereby revoking all other wills, legacies and bequests by me heretofore made, and declaring this and no other for my last will and testament. In witness whereof, I have hereunto set my hand and seal, this second day of September, one thousand eight hundred and twenty-seven. Signed, sealed, published, pronounced and declared by the testator, as and for his last will and testament, and in presence of us and at his request, have subscribed our names as witnesses.

N. B.—The words five acres and allowance interlined before signing.

This will was duly proved on the 15th of June, 1829.

The question in controversy was, as to whether the devise to the testator's widow, Elizabeth Meyer, was in fee or for life only. The same point had been presented in the previous case of *Weidman* vs. *Maish*, reported in 4 Harris, 504, in which the Court below (Lewis, President,) held that the devise was in fee, and after repeated arguments in this Court, both orally and on paper, the judgment of the Court below was finally reversed by a majority of this Court, C. J. Gibson delivering the opinion at the adjournment at the last term, and Justices Coulter and Chambers filing their dissent.

Another suit was brought by the same counsel for another party claiming an undivided sixth part of the land; and the Court below said, that without intimating any opinion of their own or examining the question, they would enter judgment in accordance with the former case; and they left the question to be settled by this Court. The plaintiffs in error were therefore the defendants below in this case.

The opinion of the majority of the Court was delivered by

Lowrie, J.—So far as relates to the intent of the devising clause, this will was disposed of in a former opinion of this Court in one sentence, and the remainder of the opinion was devoted to a clause which is entirely unimportant. The true point of this case is thus dismissed—"as to the common introductory words, it is enough to say there is nothing in particular to which they can attach; and it has long been held that they are inoperative by themselves." It is with most sincere reluctance, that we find ourselves constrained to declare that this conclusion of our predecessors is opposed to the whole current of Pennsylvania decisions, and would in almost all similar instances, frustrate the manifest intent of the testator.

As in the case of *Harper* v. *Blean*, 3 Watts., 471; this testator "had no other real estate than that described in the will. He had no issue, but left his wife surviving. He left also, brothers and sisters, under whose right the plaintiff claims." Nearly his whole fortune was the result of the efforts of himself and wife, and he

had no intimacy with his brothers and sisters, most of whom lived at a distance from him. Under such circumstances, it would not have been unreasonable if he had given all he had to his wife, and certainly common justice would declare her claims to stand much higher than those of the brothers and sisters.

But we may set aside all this, except the fact that he had no other land than that described in the will, and construe this will without the aid of any other extraneous circumstances. It sets out with the usual introduction, then directs as to his burial, and then says, "As to such worldly estate wherewith it hath pleased God to bless me in this life, I give and dispose of the same in the following manner." Then he directs payment of his debts, and then gives a particular part of his plantation to his wife, and the rest to his brother and sisters.

In the case of *Weidman* v. *Maish*, 16 State Rep., 504, this devise to the wife was held to create a life estate, and we know of no similar decision in our books, except the case of *Steel* v. *Thompson*, 14 S. & R., 88, which is an exceptional case, in opposition to prior ones, attempting to overrule one of them. *French* v. *McIlhenny*, 2 Binn., 13, decided by a majority of the Court against a strong dissent, and never since received as law, so far as we know.

The words "as to such worldly estate," &c., if they have nothing to which they can attach, must of course be inoperative. Here, however, they are most directly attached to the words "I devise *the same*," &c., what follows, then, is most plainly a specification of the manner in which his "estate" is to be disposed of, and this brings the case explicitly within that large class of cases wherein the devise of the testator's "estate" is held to carry a fee, and the whole spirit of these decisions is violated by declaring this a life estate. In the case of *Busby* v. *Busby*, 1 Dal., 226, it was declared that similar words, "unconnected with any particular devise, show an intention to dispose of his whole estate," and will help the interpretation in case of doubt. In *Caldwell* v. *Ferguson*, 2 Yeates, 250, 380, there were no words of inheritance, but a fee was raised by the words "touching such worldly estate, &c., I give *the same* in the following manner." And it was there declared that the

general clause was connected with the rest of the will by the phrase "I give *the same*."

In *Doughty* v. *Brown*, 4 Yeates, 179, the words were "touching all my worldly effects, real and personal, I dispose thereof in the following manner." And the Court say that these words "fully evince his intention of disposing of all his property."

In *French* v. *McIlhenny*, 2 Binn., 13, "As for such estate, &c., I give *the same* in the following manner," were held sufficient to carry a fee without anything to aid them. In *Cassel* v. *Cooke*, 8 S. & R., 289, a somewhat similar introductory clause is used in aid of the construction, and the Court say, "It is declared by the testator that he intends to dispose of all his worldly estate, out and out. This will not of itself be sufficient to give a fee; but it is always carried down to the devising clauses to show the interest." And the same principle runs through the case of *Campbell* v. *Carson*, 12 S. & R., 54, and going a little out of the order of time, the case of *Johnson* v. *Morton*, 10 State Rep., 245. In *McClure* v. *Douthitt*, 3 State Rep., 446, the words are "as to my worldly estate, I dispose of it as follows." And there the testator gives to his daughter a tract of land. The Court say, "We ought to have done at first in regard to words of inheritance, what our Legislature has done at last by declaring every devise to be a fee which is not specially restricted. The devise to the testator's daughters, therefore, was a fee even as the law then stood." In *Miller* v. *Lynn*, 7 State Rep., 443, the Court in speaking of similar words, say "the words in the preamble make it apparent that he intended to dispose of his whole estate. Although, therefore, there are no words of limitation or perpetuity added to the devise to the children, yet as there is no limitation over, we bring down the word estate in the preamble, and connect it with the devise in order to effectuate the intent." In *Peppard* v. *Deal*, 9 State Rep., 140, speaking of a devise of a house and the words "as to my worldly estate," the Court say "the language in the introduction is carried down to the devising clause to explain the intent." In *Hardin* v. *Hays*, 9 State Rep., 151, the Court say "it is very evident from the introductory clause, that the testator had no intention to die

intestate, but that in this case as in almost all others, he supposed he was devising his whole estate. When the word estate is coupled with a devise of real estate, it is uniformly held to be a fee simple; and this is carrying out the intention of the testator ninety-nine cases out of one hundred." Here the word estate in the introduction, was coupled with the devising clause exactly as in this case—"I give and dispose *the same* as follows." In *McCullough* v. *Gilmore*, 11 State Rep., 370, even less definite language, "all my worldly substance and property shall be disposed of in the following manner," was held to give a fee. "These words, say the Court, and the like of them are generally carried down into the corpus of the will, to show that the testator meant to dispose of his whole interest in a particular devise, unless words are used which plainly indicate an intent to limit."

With such unquestionable authority for declaring this devise conveys a fee simple to the testator's widow, it would be a waste of time to go over the decisions in England and in other States, and we content ourselves with a mere reference to some of them. *Denn* v. *Gaskin*, Cowper 660; *Loveacres* v. *Blight*, *Ibid*, 335; *Trogmorton* v. *Holliday*, 3 Burrows, 1618; *Kennon* v. *McRoberts*, 1 Wash., 96; *Wiatt* v. *Sadler*, 1 Munf., 537; *Watson* v. *Powell*, 3 Call., 306; *Winchester* v. *Tilghman*, 1 Harr. & McH., 452; *Jackson* v. *Merrill*, 6 John, 191; *Fox* v. *Phelps*, 17 Wend., 393 and 20, *Ib.*, 437; *Fogg* v. *Clark*, 1 N. Hamp., 163; *Franklin* v. *Harter*, 7 Blackf., 488.

It is among the oldest legal principles that a devise of all one's estate carries a fee; and what else is this? If we shorten the devise so as to make the sense more striking, it will stand as follows: as to all my worldly estate, I devise the same as follows: one farm to my wife, and the other to my brother and sisters; or thus: I devise all my worldly estate as follows: my personal property and half of my plantation, to my wife, and the other half of my plantation to my brother and sisters. In this form, can any one doubt its true interpretation?

It is really much more plainly a fee to each than in the cases of *Taylor* v. *Kocker*, 3 W. & S., 163, where the devise was of all his

"leasehold estate," and *Harper* v. *Blean*, 3 Watts, 475, where the effective words were "with whatever is not named that I have any right or claim to in law or equity," and *Dice* v. *Sheffer*, 3 W. & S. 419, where the words "all what I have, both real and personal property," were declared equivalent to "all my estate." It is stronger than *Neide* v. *Neide*, 4 R. 75, where the devise was "I give to my son John my late purchase from Elizabeth Clarton, and also four acres of woodland, being in a corner, &c."

How all this line of decisions was broken through in the case of *Weidman* v. *Maish*, we cannot say, but must presume that it was inadvertently done, in the crowd of business which presses on this Court, and which must occasion frequent mistakes. If they were intended to be overruled, they deserved, in their rejection, a much more ceremonious eulogy than can be comprised in a single sentence; for great have been the merits, and much good have they done in the last seventy years.

The testator gives to his wife 85 acres of his plantation, and the "residue of his plantation" to his brother and sisters, but the plain and natural meaning of this is, not that he gives his wife a life estate in one part, and his brother and sisters a fee in the rest, and also in his wife's part after her death. This phrase, in wills, has not yet been cast in the moulds of technical expression, and thus removed from interpretation of common sense. It has still sufficient pliability to fall with ease into its appropriate place, and with its proper value, in an instrument written in ordinary language. And so was a similar provision disposed of in the case of *Neide* v. *Neide*, 4 R. 82.

But it is demanded of us that we shall follow the decision in *Weidman* v. *Maish*, where this very devise has received a construction. And why must we follow it? If the law was totally misapplied in that case, when one forty-fourth part of this land was in controversy, must we therefore continue to misapply it as often as the other shares come up for discussion? Because we or our predecessors have wronged one man by our blunders, must we therefor wrong forty-three others for the sake of our own consistency?

If not thus, then on what principle can we do it? Not simply because this very devise has been decided on: most clearly not. This would be presenting the doctrine of former recovery in a new aspect. One verdict and judgment are not conclusive even in the very same interest, and between the very same parties; whereas this would make one verdict and judgment, as to one interest and one set of parties, conclusive as to all similar interests and as to other parties, even though not heard.

Does the doctrine of *stare decisis* hold us to conform to that decision? I trust that the doctrine shall never be held to mean, that the last decision of a point is to be taken as the law of all future cases, right or wrong. Then, indeed, will the isolated blunders of this Court be of far more force than an Act of Assembly or a clause of the Constitution, for they may invade the inviolability of contracts. This is certainly a new phase of the doctrine of *stare decisis*, that is most suicidal in its results. It is setting aside the old doctrine, and establishing a new one. It is a declaration that all courts of the last resort must have been in error every time they have acknowledged and set aside former errors, which has not been an unfrequent event. Nay, more; it is claiming for this Court an infallability that can have no result but the perpetuation of the most incompatible errors.

As I understand this doctrine, it is tersely expressed in the maxim *minime sunt mutanda quae interpretationem certam semper habuerunt;* and is well qualified by that other one, *quae contra rationem juris introducta sunt, non debent trahi in consequentiam*, both of which are used by Lord Coke, and are derived from the Roman law. It is well explained in Lieber's Pol. Herm. 209. "In a free country, where a knowledge of the citizens' rights is all important, a precedent in law, if correctly and clearly stated—this is an essential requisite—and if applied with discernment, and with the final object of all law before our eyes, ought to have its full weight. If there has been a series of uniform decisions on the same point, they ought to have the force of law, because, in this case, they have become conclusive evidence of the law." And the same writer has well estimated the value of a mere decision, when he

says, 1 Pol. Ethics, 265, "there is hardly such a thing as judge-made law, but only judge-spoken law. The doctrine pronounced to-day from a bench may, indeed, not be found in any law book; but the judge has ascertained and declared the sense of the community as already evinced in its usages and habits of business. If he has not expressed it correctly, society will show its sovereign power, his decision will be reversed to-morrow, or corrected by statute."

The true doctrine on this subject was declared and acted upon by this Court in *Geddis* v. *Hawk*, 1 Watts, 286, and *Cowden's Appeal*, 1 State Rep. 279, and is thus laid down by Chancellor Kent: (Com. Lect. 21,) "I wish not to be understood to press too strongly the doctrine of *stare decisis*, when I recollect that there are a thousand cases to be pointed out in the English and American books of reports which have been overruled, doubted, or limited in their application. It is probable that the records of many of the courts in this country are replete with hasty and crude decisions; and such cases ought to be examined without fear, and revised without reluctance, rather than have the character of our law impaired, and the beauty and harmony of the system destroyed by the perpetuity of error. Even a series of decisions is not always conclusive evidence of what is law, and the revision of a decision very often resolves itself into a mere question of expediency, depending upon the consideration of the importance of certainty in the rule, and the extent of property to be effected by a change of it."

Suppose that we now assert that a devise such as this does not convey a fee simple, what will be the consequence? First we defeat the intention of this testator, and wrong his devisees. Then the cases of *McClure* v. *Douthitt*, *Miller* v. *Lynn*, *Peppard* v. *Deal*, *Harden* v. *Hays* and *McCullough* v. *Gilmore*, were all decided within a very few years on the opposite principle, and all these cases will claim the right to be reheard, and all the titles acquired on the faith of those decisions may be declared invalid. How many are the wills similarly worded, which have never been heard of in Court, because their construction has been considered as settled by former decisions, it is impossible to tell. We dare not say that the

principle of this case shall be limited to this will, for this would be making the rights of the parties depend on the will of the judge, and not on the law of the land. We cannot do justice in this case without rejecting the decision in *Weidman* v. *Maish*, and reversing this judgment.

Judgment reversed, and judgment for defendants below, with costs.

GIBSON, J., *dissenting*.—It is said, in the opinion of the majority, that when this will was before the judges who composed this court, in *Weidman* v. *Maish*, the introductory words were disposed of in a single sentence; and that the rest of the opinion was devoted to a clause entirely unimportant. We, however, followed the course of the argument; for, the fact is, the effect of these words was not relied on by the counsel in that case, who have made it a successful point in this. They cast it from them; and though the counsel on the other side spoke to it in anticipation, no one, whether counsel or court, harbored a thought that the devise of the land, unconnected with the bequest of the personal property, would give the fee with or without the introductory words. The counsel who have argued for the larger interpretation have shifted their ground; but, on that occasion, they rested their case on the supposed blending of the real and personal estates in one gift; and whether they were so blended was the question argued and the question decided. They have since picked up their derelict argument, and succeeded with it. The opinion of the majority is rested on the introductory clause as an interpreter of what is too plain to admit of interpretation. What is the office of an introductory clause when it is suffered to have an office. "Such introductory words, says Chancellor Kent, 4 Com. 541, "are, like a preamble to a statute, to be used only as a key to disclose the testator's meaning." Then, before it can be used, the meaning must appear to be locked up. But treat them as a preamble to a statute and they will produce the same result; for the preamble is never invoked to expound the meaning of words too clear to admit of exposition. "In doubtful cases," it is said, in Dwarris on Stat. 655, "recourse may be had to the preamble to discover the inducements

the legislature had to the making of the statute; but when the terms of the enacting clause are clear and positive, the preamble cannot be resorted to. Let any lawyer say whether the legal effect of any terms could be more clear and positive than the legal effect of the words, "I give, devise and bequeath to my beloved wife Elizabeth, eighty-five acres, and allowance of my land of my dwelling-place whereon I now live." Why, then, bring down introductory words to the operative clause to obscure what is as clear as a sun-beam to a professional eye without them? Had the testator intended to make them words of devise he would have brought them down himself. What if he would not? His intention must prevail; but he must express it in positive, not inferential, words, to show what it actually was. Without such words, it may be a subject of guess, but not of adjudication. *Voluit sed non dixit* is the legal aphorism. Lord Mansfield was right in saying that perhaps every devisor means to give a fee when he does not explicitly give less. Yet even he, with all his boasted liberality of opinion and disregard of technicality, shrunk from the task of giving effect to this putative intention, without definite and direct words to declare it. It had been well if the courts had started with the principle, since prescribed for prespective cases by English and American legislation; but to overturn their intermediate adjudications would uproot titles and produce general consternation. It is for this reason that the English and American judges have excluded extraneous influences and gone, in unambiguous cases, by the direct words of the devise, without inferences, from the introductory words. "It is established," as it is said in 2 Jarman on wills, 187, "that the word *estate*, occurring merely in the introductory clause in the will, by which the testator professes in the usual manner to dispose of all his worldly and temporal estate, will not have the effect of enlarging the subsequent devises in the will." The same principal is repeated in Powell on Devises 416; and there is not an exception to it in the English books, unless *Grayson* v. *Atkinson*, 1 Wilson, R. 333, be one. There were several elements in the constitution of that case: the decisive ones of blending the real and personal estate in the same disposition,

and charging the land with debts and legacies. It is not clear on what ground Lord Hardwicke put his opinion; and the case cannot be deemed an authority for anything in particular.

It is assumed in the opinion of the majority, that this unbroken current of decisions elsewhere, has been rolled back by a counter-current of our own, insomuch as to bring down from the lumber-garret of the scrivener's cranium, the hacknied form of introductory words, in order to stick it into the operative clause as a part of it, and hitch it to any thing in the form and dimensions of an indefinite devise. It is not assumed that the words of it give a fee *proprio vigore;* nor could it be, for, standing alone, they mean nothing, or that the testator, having done with the usual legacy of his soul, and with directions about his funeral and the payment of his debts, was going to dispose of the residue of his property among the objects of his bounty. Like the "grace of God" in a policy of insurance, they are words of course which serve as a prologue to the business in hand, taken from the scrivener's formulary, and put down preparatory to putting down the testator's devises and legacies. Notwithstanding their stereotyped occurrence on every will drawn by an unprofessional hand, it is insisted that wherever there is any thing to hang them on, it takes their hue and becomes a devise in fee. If that is not the effect attributed to them, in what case can they have any other? And if they are to have that effect in any unambiguous case, they must have it in every case. Have the decisions of this court produced a state of things so anomalous?

The first of them is *Busby* vs. *Busby*, 1 Dall. 226, which I respectfully submit has been misapplied. The general principle is pertenaciously maintained in every part of it. It was said the words, "as to all my worldly estate in the beginning of a will, unconnected with any particular devise, show an intention to dispose of the testator's whole estate, but will not carry an estate which was *clearly omitted*; but if it be dubious whether it has been omitted or not, it will help the interpretation." With what devise in this will are those words particularly connected? with the devise to the widow, or with the devise to the brother and sisters? or is it at all

dubious that words to carry the fee are omitted in a devise of eighty-five acres?

Caldwell vs. *Ferguson*, 2 Yeates 250, the next case invoked, was a nisi prius decision; but it was well ruled. The word estate when incorporated in the body of a devise, and not used to individuate the subject of it, carries the testator's entire interest. "Touching such worldly estate wherewith it has pleased God to bless me," said the testator, "I give *the same*." What? His estate to which the effective words of the devise were immediately directed. The word could not be brought down to the devise, for it was there already. The whole was contained in one paragraph; and the meaning of it was as clear as if the word "estate," had been put in the place of the words "the same." We know not on what ground the court put its opinion, for none is stated in the report; but the devise was of woodland, which has always been held to carry a fee.

Then came *French* vs. *McIlheney*, which certainly overcame us like a summer cloud, but not without our special wonder. It had been ruled at the circuit by Judge Yeates; but on what particular ground we know not; and according to the course of the court, then composed of three judges, the cause was heard on appeal by Chief Justice Tilghman and Judge Brackenridge. The Chief Justice took the ground I have occupied in this instance; but Judge Brackenridge, whose notions about the propriety of rules to work out the intention of a testator were peculiar, adopted the popular meaning, independently of words of limitation or perpetuity; and the judgment was affirmed. Judge Duncan has told us in *Cassell* vs. *Cook*, 8 Serg. & R. 288, that this opinion of the judge was announced as a declaration of independence; and that Judge Yeates disclaimed it, as he certainly did indirectly in *Clayton* vs. *Clayton*, 3 Binney 490. There is something plausible in the notion that common sense is more likely to reach the actual intent, than artificial rules of construction. But wills are not always penned by men of common sense. They frequently afford no clue to the testator's meaning which common sense can lay hold on. The meaning might seem clear to a man of good sense at the first blush; but, such is

the imperfection of language, it might to a man of equally good sense seem clear the other way. In such a case, what could be done? Leave it to a jury to ascertain the intention? We know how far plain sense goes to produce unanimity in a jury box. The destination of the property would be left to chance or endless litigation. Besides, by reason of the happening of unforeseen and unprovided for contingencies, it is sometimes an unavoidable duty to suppose a testator to have had an intention where there actually was none. Without a rule to conduct him to a conclusion, what could a judge do? Rules of interpretation, though they do not always effect the actual intent, produce certainty of result, stability of title, ultimate repose, and prevent the value of the property, thrice told, from being sunk in lawsuits; against which, a departure from the popular meaning weighs not a feather. In *Findlay* vs. *Riddle*, 3 Binney 161, that distinguished judge (for Judge Brackenridge, though failing in respect for precedent, was certainly distinguished for intellectual vigor in the investigation of legal principles) resorted to a grammatical analysis of a devise—an unsafe expedient, for every one knows how much the transposition or substitution of a word may change the tone of the whole. *French* vs. *McIlhenny*, is an authority for, rather than against, what I take to be the orthodox doctrine.

In *Campbell* vs. *Carson*, 12 S. & R. 56, the introductory words were legitimately resorted to in order to explain the ambiguous words, "to be by her fully possessed and enjoyed"—a use of them sanctioned by *Busby* v. *Busby*. In *Johnson* v. *Morton*, 10 Barr, 245, there were no introductory words at all; and in *McClure* v. *Douthitt*, 3 Barr, 447, no more was decided than had been decided in Westminster Hall, that the word 'share' was sufficient of itself to pass the testator's entire interest. True, it was said we ought to have done at first what the legislature has done at last; but it was not said that it was not too late to do it now at the expense of those who have purchased titles supposed to have been long judicially settled.

So far the decisions of this court have been consistent, but adverse to the principle for which they have been cited. But in

Miller v. *Lynn*, 7 Barr, 443, a devise ushered with the usual flourish of trumpets was held to pass a fee without words of limitation or perpetuity, or any of their equivalents. That case was a railroad accident. I agree that if it be law it rules the present; but I have never known a more bold or reckless innovation. Even the rule in Shelly's case was denied in it to be a rule of property in Pennsylvania. Why a dissent was not marked in the report of the case I know not; but I know that Mr. Justice Bell and myself did not concur. The pressure of business left little time for consideration, and we were compelled to go at railroad speed, so that much depended on the judge who prepared the opinion, which, unseen by the rest of the court before it was delivered, too often exhibited his peculiar notions. The opinion of the learned judge was a second declaration of independence. No authority was cited for it, but the decision was rested on the effect of the introductory words, though there was no ambiguity in the devising clause. Its intrinsic evidence shows that the case was not deliberately considered.

Peppard v. *Deal*, 9 Barr, 149, is also cited; but though certain dicta of the judge who delivered the opinion in that and the preceding case, would seem to favor the argument, the judgment, which was alone the act of the court, does not. "As to my worldly estate," said the testator, "I devise the house in which I now live to my son Samuel; and the remainder of my *estate*, *real* and *personal*, among my children." There were two features in this devise, either of which gave the children a fee, but which were not touched in the opinion—an immediate gift of the property as the testator's estate, and a jumbling together of the real and personal estates. *Harden* vs. *Hayes*, id. 151, is in the same category: the land was charged with money, and expressly for that reason the estate was enlarged to a fee.

McCullough v. *Gilmer*, 1 Harris, 320; *Saylor* vs. *Kocher*, 3 W. & S. 163; *Harper* vs. *Blean*, 3 Watts 471; *Neide* vs. *Neide*, 4 Rawle, 75, and *Dice* v. *Shaeffer*, 3 W. & S. 419, are cases in which an intention to dispose of the fee was as clearly expressed and con-

clusively disclosed as it could be, without technical words of limitation.

These are the cases adduced to show that this court had shaken off the rule in England and our sister States; and it must be left to future judges to say whether it has done so. The importance of the doctrine of *stare decisis* in cases which involve title to land, I leave to the consideration of the profession, and emphatically of the owners of real estate. I am therefore of opinion that the construction made of this will when it was here before ought not to be disturbed.

Black, C. J., also filed a dissenting opinion.

Note.—At the present session of this court at Philadelphia, the same point arose in a Pittsburg case, and an opinion affirming that of Lowrie, J., was delivered by

Woodward, J.—The only question in this case arises upon the construction of the will of Judah Calt, deceased. After the usual introductory clause the testator says, "as to such worldly estate wherewith it has pleased God to intrust me, I dispose of the same as follows;" *Imprimis* relates to debts and funeral expenses; "Second, I will and devise that all my landed estate which I own in the County of Erie, as well as in other parts of the State of Pennsylvania and elsewhere, be disposed of as hereinafter described." He then goes on to make various devises to his niece, Eliza B. Ely, and, among others, the two lots in question, known as 367 and 368. In these devises to her there are no words of inheritance, condition or limitation, and no devise over of any of the property given to her. Is her estate under this will a life-estate or a fee simple? Carrying down the clauses of the will which I have quoted and connecting them with the devise to Eliza, it is apparent that he meant to give her his whole estate in these lots, and this conviction is riveted by the absence of any devise over. But may those clauses be thus brought down and connected? That they may has been so fully demonstrated lately in this court by my Brother Lowrie, in the case of *Shriver* vs. *Meyer*, that it would be a waste of time to do more than refer to that able opinion and the numerous authorities therein cited and discussed.

I take this opportunity to say, in regard to *Shriver* vs. *Meyer*, that finding on record (See 4 Harris's State Rep. 504) an opinion from a judge who is entitled to my profoundest deference, that the will there created only a life-estate, I paused long before I consented to Judge Lowrie's opinion that it created a fee. But I was constrained at last by the force not only of authority, but of reason to concur with him and our Bro. Lewis in overruling the former opinion of this court, and in declaring the estate devised a fee simple and not a life-estate. Subsequent reflection has confirmed me in the opinion finally settled in that case, an opinion abundantly sustained by the most approved authorities, and in accordance with the spirit of our legislature in the Act of 8th April, 1833, relating to last wills and testaments (sec. 9.

District Court of Philadelphia, December, 1852.

NORTH AMERICAN INSURANCE COMPANY *vs.* LEVY.

1. When the plaintiff, as insurer, by several counts claims damages for expenses alleged to have been incurred in the investigation of representations falsely and fraudulently made to him by the defendant, for the purpose of procuring a policy upon the life of his debtor, and no evidence is given to support these counts, but evidence that certain representations made by defendant at the time was produced, a count in *trover* joined with them is not sustained.

2. Whether, if such a policy were fraudulently procured, *trover* would lie for it.—

3. It *seems*, if there be any common law remedy, *detinue* is the proper one; but redress might be sought in a Court of Chancery upon an application for a surrender of the policy for cancellation.

This action was brought to recover a policy of insurance alleged to have been fraudulently obtained from plaintiffs, as also damages for so obtaining the same and refusing to redeliver it.

The defendant insured the life of Jno. B. Sturdevant, representing him in good health and of a certain age, and producing a certificate of his health, said to be given by his family physician.

Plaintiff offered various witnesses to prove that the representations made were false — that defendant had falsely stated the amount of indebtedness of said Jno. B. Sturdevant to him, which was part of his declaration at the time the policy was procured; that said Sturdevant was not in good health; that his age was greater than alleged, and that the physician giving the signature was not his family physician.

After hearing the testimony, the judge ordered a non-suit.

This was a motion to take off non-suit.

Chas. E. Lex & H. M. Phillips, Esq'rs, for Plaintiffs.

C. M. Husbands & Wm. L. Hirst, Esq'rs, for Defendant.

On the authority of *Shriver* vs. *Meyer*, therefore, the majority of the court decide in the case before us that Eliza B. Ely took a fee simple estate in the lots in question under the will of Mr. Calt, and the judgment of the Common Pleas is accordingly affirmed.— *Wood* vs. *Hills*.

December 18, 1852, the opinion of the Court was delivered by

Stroud, J.—The defendant, as a creditor of John B. Sturdevant, obtained from the plaintiffs an insurance on the life of Sturdevant. In less than a year from the date of the policy, and within the time to which the insurance extended, and whilst Sturdevant was living, the plaintiffs say they discovered that several representations which the defendant had made to them in respect to the age, the state of health of Sturdevant, and the amount of the debt due by him to the defendant, had been falsely and fraudulently made. On this alleged discovery they tendered to the defendant the money which he had paid as a premium for the insurance, and at the same time gave him notice that they regarded the policy as void in consequence of the false and fraudulent representations which they asserted he had made.

They soon afterwards instituted this action. The declaration filed is in covenant, and contains numerous counts.

The *first* of these is in *trover* for the *policy of insurance*. The other counts, although varying in some particulars of statement, may be classed together as demanding a reimbursement of expenses alleged to have been incurred by the company in the investigation of the representations made by the defendant falsely and fraudulently, in order to procure the policy.

No evidence whatever was given to sustain any of the last-mentioned counts, and they may at once be dismissed from inquiry.

After receiving all the evidence offered by the plaintiff, a non-suit was ordered under the 7th section of the Act of 11th March, 1836, relative to this Court.

A motion has been made to set aside this non-suit.

This motion raises but one question: whether the evidence given sustains the count in *trover* for the policy.

No precedent for such an action has been found. It is sought to be maintained on the ground that as under similar circumstances a Court of Equity would compel the surrender of the policy for cancellation, a court of common law ought to reach the same end by the common law remedy which has been resorted to.

The novelty of the attempt, the want of precedent for a similar use of the action, does not, it is true, in itself, constitute an insurmountable objection to the plaintiff. But it certainly furnishes a very strong presumption against it. With equal reason, *trover* might be brought by an obligor of a bond, or a maker of a promissory note, whenever fraud in the procuring of these instruments would be an available defence to the usual common law actions of *debt* or *assumpsit*. But such a procedure would be an unheard of novelty.

It is said, the person whose life has been insured by his creditor, may be the most important witness to show the state of his health, at the time when the insurance was effected. And consequently, to wait until an action has been brought upon the policy, by reason of his death, would operate to the detriment of the insurer, in the loss of this evidence. But disease, so latent as to elude the detection of a physician, could scarcely be known to a creditor of any one, whose life might be the subject of insurance, and unless the representation supposed to be false were knowingly or rashly made, it would not, speaking generally, vitiate the policy.

Whether, admitting the policy to be incapable of enforcement, by reason of its fraudulent procurement, the insurer is entitled to its possession, may be very questionable. By the commercial law, payment cannot be demanded of a bill of exchange or promissory note, without a contemporaneous surrender of the instrument. *Howard* v. *Robinson*, 7 B. & C., 90, but this is grounded on the custom of merchants, and is peculiar and restricted to *negotiable* evidences of debt. The rule of the law as to other documents, generally, if not universally, is otherwise, and in defect of this element, it is not easy to perceive how the action of trover could have any basis.

If any common law remedy can be supported on the state of facts existing in the evidence of this case, *detinue* would seem to be the proper one.

But there is no necessity in any view, which can be taken of the subject, to sustain either *trover* or *detinue*.

Our courts are now invested with chancery powers. The plaintiff might have sought redress there, and if entitled to recover what he claims, he may obtain a surrender of the policy for cancellation. Equity proceedings are better suited to the nature of such an investigation, than an action at common law.

Motion dismissed.

ABSTRACTS OF RECENT AMERICAN CASES.

In the Supreme Court of the United States, January, 1853.

Navigable Stream—License.—By the law of Pennsylvania, the river Delaware is a public navigable river, held by its joint sovereigns in trust for the public.

Riparian owners in that State have no title to the river or any right to divert its waters unless by license from the States.

That such license is revocable, and in subjection to the superior right of the State to divert the water for public improvements, either by the State directly or by a corporation created for that purpose.

The proviso to the provincial acts of Pennsylvania and New Jersey of 1771 does not operate as a grant of the usufruct of the waters of the river to Adam Hoops and his assigns, but only as a license or toleration of his dam.

As by the laws of his own State the plaintiff could have no remedy against a corporation authorized to take the whole waters of the river for the purpose of canals or improving the navigation, so neither can he sustain a suit against a corporation created by New Jersey for the same purpose, who have taken part of the waters.

The plaintiffs being but tenants at sufferance in the usufruct of the water to the two States who own the river as tenants in common, are not in a condition to question the relative rights of either to use its waters without consent of the other.

This case is not intended to decide whether a first licensee for private emolument can support an action against a later licensee of either sovereign or both, who, for private purposes, diverts the water to the injury of the first.—*Geo. Rundle et al* vs. *Delaware and Raritan Canal Co.* Opinion per GRIER, J.

Habeas Corpus—Fugitive under treaty.—The provisions of the treaty between the United States and Great Britain, concluded 9th of August, 1842, and the Act of Congress passed August 12, 1848, in respect to fugitives from justice are of themselves a law which the judges and magistrates of the Union may execute without other authorization. *In the matter of Thomas Kaine, an alleged fugitive from justice from Great Britain.* Opinion per CATRON, J.—TANEY, Ch. J., NELSON, J. and DANIELS, J. *dissented.*

The Commissioner who issued the warrant of arrest and commitment was at the time, by nature of his appointment and the acts of Congress in force, a magistrate within the meaning of the treaty. *Ibid.*

The judges or magistrates act under the treaty upon complaint on oath, and the treaty does not require any requisition upon them by a minister or officer of the British Government, in order to give them jurisdiction of the subject. The requisition is to be by one government on the other, for the extradition of the criminal after his commitment by a judicial officer. *Ibid.*

The Act of Congress, Aug. 12, 1848, is auxiliary to the treaty. It no way curtails or limits the operation and effect of the treaty, nor are any of its enactments repugnant to the treaty stipulations. *Ibid.*

The Act of Congress is valid and must be carried into effect by the judiciary. *Ibid.*

The Commissioner of the United States was authorized, by virtue of his appointment, to take cognizance of this case, under the Act of Congress referred to. *Ibid.*

The return of the Marshal, connected with the documents thereto annexed, shows upon its face that the subject-matter was brought before the Commissioner by a complaint on oath, and legal proof that the prisoner was a fugitive from justice from Great Britain. *Ibid.*

During vacation, Mr. Justice Nelson had allowed a writ of *habeas corpus,* and on its return had made an order directing the matter to be argued in this court; *Held,* by the whole court, that this court has not jurisdiction upon the case as certified by Mr. Justice Nelson.

Held, also, that a *certiorari* could issue to bring up the proceedings in case a *habeas corpus* was issued by this court. *Ibid.*

Held, per M'LEAN, WAYNE, CATRON and GRIER, JJ. that assuming the court to have jurisdiction, and without passing on that question, that the prisoner was not entitled to be discharged.

CURTIS, J. concurred in refusing to discharge the prisoner on the ground that this court had no jurisdiction to issue a *habeas corpus* in this case.

Held, by the minority of the court, that the commissioner had no authority to act—that a requisition should first have been made by the minister or other representative of the British Government, or by an officer specially authorized for that purpose, and that the authority of the magistrate to issue the warrant and take the information was not sufficiently proved. Opinion per NELSON, J.—TANEY, Ch. J. and DANIELS, J. *concurring.*

Patent—Novelty—A principle is not patentable because a principle is a fundamental truth, an original cause, a motive, and in this no one can claim an exclusive right. *Leroy* v. *Tatham* Opinion per MCLEAN, J.

Hence, where the court instructed the jury that the invention in dispute did not consist in the novelty of the machinery, but in bringing a newly-discovered principle into practical application, by which a useful article of manufacture is produced, and wrought pipe made as distinguished from cast pipe, and that although this was specifically claimed by the patentees as their invention, it was not a material fact for the jury, such instruction was error and judgment will be reversed on that ground. *Ibid.*

Supreme Court of Pennsylvania, at Philadelphia.—December Term, 1852.

Assignment.—A subsequent assignment by a debtor, cannot divest the lien of a prior levy upon goods. *Guthries' Appeal*, LEWIS, J.—Affirming *Hutchinson* v. *McClure*, 1 Am. Law Reg., 170.

Assignment of Errors.—A party cannot assign for error the admission or rejection of evidence, or complain in this Court, of an instruction below, unless he tenders or seals a bill at the trial, so that the matter may appear of record. *Quellman* v. *Jacobs.*—WOODWARD, J.

Bail in Misdemeanor.—A sheriff cannot bail a prisoner when arrested for any misdemeanor. Where a sheriff arrested one charged with fornication, and took a bond from him for his appearance to answer the offence, such bond is void. *Keller* v. *The Com.*—WOODWARD, J.

Injunction.—By the Act of May 6, 1844, it is provided that no injunction shall be issued by any court, until the party applying for the same shall have given bond conditioned to indemnify the other party, which

Act was intended to apply to all cases, including the Commonwealth herself. The Commonwealth can give no bond, there being no person authorized to make it; and if given, no suit could be maintained on it. Hence, the Commonwealth cannot have a preliminary injunction. *The Com.* v. *The Franklin Canal Co.*, BLACK, CH. J., delivering the opinion of the Court.—LEWIS, J., dissenting.

Judges' Comments on Points Presented.—A judge acts within the line of his duty, when he accompanies his answers to points made by counsel, with such observations as are necessary to guard the jury from falling into error, where a simple affirmative or negative answer, although strictly correct, as far as it went, might lead the jury astray. *Leech* v. *Leech*,—LEWIS, J.

Levy on Land.—It is no valid objection to a levy on land, that it embraces too much property, or that that is named as several parcels which ought to be sold together. If several parcels are improperly united in one sale, the Court whence the execution issues may set aside the sale, and give the sheriff proper instructions. *Donaldson* v. *The Bank of Danville.* LOWRIE, J.

Amendment, with leave of the Court, is the proper remedy for any vagueness, uncertainty, or other defect of description. *Ibid.*

When the defendant suffers injustice by reason of an improper description, it is within the discretion of the Court whence the writ issues to correct it. *Ibid.*

Mistake.—Interest on Purchase Money.—Where a grantor, by mistake, included in his deed ten acres, which had been sold many years before to another, and which were in possession of his grantee at the time of the contract, the grantee cannot demand a deduction from the consideration money, by reason of such mistake, especially where it appears that the party complaining gets thirty-two acres more than was estimated in the contract. *Shearer* v. *Gilty.* LOWRIE, J.

Where a vendee enters into possession, and enjoys his purchase by reaping the rents and profits, he must pay interest upon his purchase money, according to his contract, although the heirs of the vendor brought ejectment and failed to recover. *Ibid.*

Partnership Property.—Levy on.—Trespass.—A sheriff acting under an execution, at the suit of a judgment creditor of one partner in a firm, can sell and deliver no part of the partnership goods, but only the contingent

interest of the debtor partner in the stock and profits, after settlement of partnership accounts, and payment of partnership creditors. *Deal* v. *Bogue*. WOODWARD, J.

The only levy that can be made on such an execution, consistently with the principles of the partnership relation, is of the debtor's interest in the whole stock, and that is to be measured by final account. *Ibid.*

Where one partner sued the sheriff, his deputy, and the execution creditor, in trespass for seizing and selling the partnership goods on an execution against his copartner, and the defendants pleaded not guilty; *held*, that the nonjoinder of all the owners as plaintiffs could only be taken advantage of by plea in abatement, and that such plea was too late after the general issue pleaded. *Ibid.*

The sheriff and his deputy were liable as trespassers in such case, in virtue of their office. The plaintiff in the execution would not be a trespasser, unless he did something more than merely issue his writ; but if he attended the sale, and bought part of the property, he is liable as a trespasser. *Ibid.*

Rail Road Charter—Construction of.—Under the provisions of the charter in question, the Court will not set aside an assessment of damages, upon the sole ground that the Court differed from the jury in an estimation of the amount. *Philadelphia, Baltimore and Wilmington Railroad* vs. *Gessner*. LEWIS, J.

Interest should be allowed on the amount assessed as compensation from the time when the Company took possession of the land. The duty of ascertaining the amount is an incident to the obligation to pay, and must fall upon the Corporation. *Ibid.*

Sheriff—Practice—Payment of Money into Court.—In this State, since the foundation of the province, the practice has been for the Sheriff to sell on all the executions in his hands, leaving the distribution of the money to the Court. But if the Sheriff chooses, even to prevent delay and save expense, to pay the money raised upon the execution to the creditor supposed to be entitled to it, the payment is unofficial and informal, and should the payment be wrongful, he is not protected. *M'Donald* vs. *Todd*. GIBSON, J.

Statute of Limitations.—An admission of a debt made to one who is not the plaintiff, or any agent of his, but is a stranger, will not take a case out of the statute of limitations. *Anderson* vs. *Allison*. LEWIS, J. Affirming *Kyle* vs. *Wells*, 17 Penn. St. Rep. 287.

Surety of Tax Collector.—It is no bar to an action against the surety of a tax collector that at the time of his appointment he was in default as collector for a previous year. *Borland* vs. *Washington Co.* LOWRIE J.

Witness—Promise to pay.—When a debt is justly due and a debtor promises to pay it when he gets his money and suit settled against a third person, if the creditor would wait, such a promise is not contrary to the policy of the law. *Grove* vs. *M'Calla.* LEWIS J.

Such creditor may be called upon to testify in such suit and the debtor's promise will not be thereby invalidated. *Ibid.*

Will—Trusts—Construction of words.—Where one devises all his real estate for life and all his personal estate absolutely, "having full confidence that his wife will leave the surplus to be divided at her decease justly among her children," the words do not of themselves import a trust, nor will they be so construed without other expressions to control them. *Mekonkey's Appeal.* LOWRIE J.

Words in a will expressive of desire, recommendation, and confidence, are not words of technical, but of common parlance, and are not *prima facie* sufficient to convert a devise or bequest into a trust; and the old Roman and English rule on this subject is not part of the common law of Pennsylvania. *Ibid.*

Such words may amount to a declaration of trust when it appears from other parts of the will, that the testator intended not to commit the estate to the devisee or legatee, or the ultimate disposal of it to his kindness, justice or discretion. *Ibid.*

By this will the absolute ownership of the personal property of Mr. Pennock is given to his widow, with an expression of mere expectation, that she will use and dispose of it discreetly as a mother, and no trust is created thereby. *Ibid.*

LEGAL MISCELLANY.

——The discourse of M. Berryer, as *bâtonnier* (president of the order of barristers), delivered, at the recent opening of the *conférence* of advocates at Paris, has attracted great attention from the manliness of its tone, and the courage with which, at the present time, when freedom of speech is proscribed, he vindicates the independence of the bar. We subjoin some extracts, which will give an idea of the style and character of this address.

M. Berryer is a legitimist of the purest and most consistent personal character; he is at the same time among the most distinguished statesmen and the most learned and eloquent advocates in France.

This eulogium on the French bar is striking:

"The duration of the ancient institution of the French bar, left standing in the midst of so many ruins, without an alteration in its constitution, its franchises or its principles, is a remarkable fact. M. d'Aguesseau has well said of our order, that it is 'as old as the magistracy, as necessary as the administration of justice.'

"Go back to the most remote period, read over again the *ordinances* of our kings in the twelfth and thirteenth centuries, consult that especially made by Philip of Valois in 1344; in them are written the statutes under which we practise, and which we guard with vigilance to this day.

"There are, indeed, lawyers in all countries, but nowhere does there exist a bar constituted like that of France. The order of advocates, regulated as it is, like the great and salutary office of public prosecutor, is an institution peculiar to our country. The origin of both is common and contemporaneous. In the earlier periods of our great judicial bodies, to the members of the bar, to advocates even, daily exercising their profession in the service of private interests, the functions of public prosecutor, in causes where such intervention became necessary, were confided by the throne. Thanks to the regulations of our body, advocates have always preserved, in the exercise of their profession the same spirit which inspired the noble answer of M. Henri de Mesmes, when refusing from Francis I. the place of the *Advocat Genèral*, M. de Rugé, who had fallen under the displeasure of the king. 'He is my own advocate,' said the latter, 'Every man chooses one to his liking. Shall I be in a worse position than the meanest of my subjects?' 'He is,' replied M. de Mesmes, 'the advocate of the crown, not obedient to your passions, but to his duty.'

"Yes, gentlemen, our regulations thus maintained our independence because they uphold among us strict principles of disinterestedness and loyalty. They ennoble our office, and I may say, too, they elevate the art of the orator in giving to his words an authority which commands respect.

"Beware that you do not misconceive the character of this independence. As the learned and venerable M. Henrion de Pensy has said, it is the liberty of a man *too proud to have protectors, too powerful to have favorites*. The advocate is without servants as without masters. He is animated by no spirit of rebellion or hostility to authority; this independ-

ence is the sentiment of one whom nothing can deter from duty, nothing can compel to wrong.

"Free, because not subjected to the will or caprice of power, the true advocate can never incline before the passions of his client. His disinterestedness is his strength; throwing off every yoke, he asserts the freedom of his mind, he establishes himself in the love of justice and truth, and in a zeal for the rights of all, and exalts in his heart the consciousness of the nobility of his office.

"It is this sentiment of honor which makes our profession beloved, and attaches us to the duties which it imposes. It gives to the orator that calm self-possession which preserves the judicial arena from the storms of interest or the violence of passion. It impresses on his language that high propriety and that frank dignity which elevates even the majesty of justice, before which it is heard. A judge in some sort, before being counsel, the advocate applies himself conscientiously to a profound study of his cause; for the case best argued is always that which has been the most honestly examined. * * * * * * * *

"In this way is the work of justice worthily prepared. These are our guarantees with the magistracy and the public. We are eloquent through the heart, and the heart vibrates only under a sense of proper self-respect. Ingenious subtlety, brilliant powers of mind may astonish and captivate for a moment; but profound emotion and fervent and impressive speech come only from a soul honestly inspired, honestly convinced; and these alone can plead powerfully, and carry away the reason and the conscience of the judge."

M. Berryer, admitting that great oratorical success can be obtained but by a few, finds, nevertheless, place at the bar for more ordinary talents. After citing several examples, particularly that of M. Caubert, who lived beloved by his colleagues and honored by the bench, he concludes thus:

"The example of such a life must inspire him who is not seduced by the fame of brilliant success with a love of our profession, and encourage him to enter on its career, whatever be his modesty or self-distrust; it is because it offers such noble and weighty advantages that the profession of the law has ever been dear to those who can comprehend the duties and remain faithful to the traditions and observances, which assure our dignity and independence.

"From the midst of the illustrious orators, the great juris-consults, the men of exalted knowledge and wise judgment who have been formed by

our order, power has often sought its most eminent functionaries and most able defenders. When the storms, so frequent in the regions of government and politics, have prostrated authority, the throne, the higher officers all have felt themselves proud to return to this certain and honorable career; and more than one has regretted quitting it for a day. Calm independence, a dignified but tranquil life, a devotion to right and justice, give vast strength to the soul, and are a sacred refuge in the evil days against political agitation and calamity.

"As for me, gentlemen—for one may speak of himself in these conferences, where each brings the tribute of his own experience—I may thank God that he has inspired me from my earliest youth with the desire and the resolution to consecrate my life to the practice of the law, and to follow the example of a father who, for more than sixty years, remained attached to the labors and principles of our order. If, without ceasing to be an advocate, I have been called to the tribune, I trust that I have ever showed myself faithful to the spirit of our regulations, and to the sentiment of our independence.

"Let me hope that in the long and difficult trials through which I have passed I have deserved the honor which the suffrages of my colleagues have conferred upon me, and that I may in some degree make myself useful to you. Proud of having to accomplish the task confided to me, I shall endeavor to follow and to encourage your labors. I have no longer to share my life between the duties of the advocate and the legislator; the tribune is mute, but the sanctuary of justice remains inviolable."

——A recent English paper gives the following amusing report of a case in the Court of Exchequer:—*Duff and others* (directors of the Commercial and General Life Assurance Company) v. *Gant*, in which an important decision was given by the judges as to the obligation of a party assuring his life to disclose material facts respecting which he may not be questioned.

The cause was tried before Mr. Baron Maule, at Guildhall, and on the material issues the verdict was found for the defendant. The action was on a bill of exchange, but in point of fact the question was on a dispated policy of assurance.

Mr. Edwin James moved for a rule *nisi* for a new trial, on the ground of misdirection. The learned counsel briefly stated the facts of the case, which appeared to be as follows:—The plaintiffs are the directors of the Commercial and General Life Assurance Company, and the defendant was

the surety of a man named William Crabb Knight, now deceased. In the year 1850 Knight borrowed the sum of £200 from the above Company, and, as security for the same, insured his life to the amount of £600, and also gave the personal security of the defendant, Mr. Gant. The policy of assurance was effected on the 22d of May, 1850, and on the 15th of May, 1851, Knight, being insane at the time, committed suicide by drowning himself. The assurance office then brought an action against Mr. Gant on his promissory note of £200. The defendant set up against this claim the policy of insurance, which the Company declared to be void on the ground that the deceased had fraudulently concealed from them the material facts of his mother and brother having died insane. The question proposed by the office, on which this was grounded, was the following: "If aware of any disorder or circumstance tending to shorten life or to make an assurance more than usually hazardous?" For answer to this the deceased had written, "Don't know of any." At the trial, one of the issues, as to the fact of the deceased's mother and brother having died insane, and of his having been aware of this at the time he effected the insurance, was found for the plaintiffs. Mr. James now contended that it was material that the deceased should have communicated to the office the manner in which his relations had died.

The Lord Chief Baron.—It was not necessary that a man should voluntarily state the circumstances attending the deaths of his relations. Suppose a man was in the habit of bathing twice a day, and that he was not aware that such a practice tended to shorten his life. The non-statement of this fact would not render his policy invalid. He himself had known a gentleman living in the neighborhood of Cambridge who had bathed throughout the year; but he was so far from believing that the habit was injurious, that he imagined he was gaining strength and vigor from it.

Baron Alderson.—I believe, for instance, rowing matches at Oxford and Cambridge tend to shorten the lives of the undergraduates. (Laughter.)

The Lord Chief Baron.—Surely a man is not bound to tell an assurance office that he is in the habit of hunting every day during the season, although it might break his neck some day.

Mr. James.—No, my lord. It was proved in this case that Knight, immediately before his death, filled up a proposal for an assurance, and

that he then voluntarily stated that his mother had died insane at 73 years of age, and his brother at 45.

Mr. Baron Platt.—That tends rather to show the *bona fides* of the deceased, when his attention was drawn especially to the manner of their decease.

The Lord Chief Baron.—If the proposal does not require any information on gout, it is not necessary that a man should state that his father and mother were afflicted with that disease.

Mr. James.—He is bound to state the existence of hereditary disease.

The Lord Chief Baron.—No, if you do not put any question about it. It was held by the celebrated Browne, the founder of the Pneumonia system, that if Peter inherits his father's estate he will also inherit his gout, but not otherwise. Suppose an office asks whether a person has a desire to go up in a balloon. (Laughter.)

Mr. James.—But the desire to go up in a balloon is not hereditary. (Laughter.) If it was known that a man had a monomania for going up in balloons, it would render the insurance more hazardous.

The Lord Chief Baron.—Suppose a man were in the habit of sleeping without a night-cap? (Laughter.)

Baron Alderson.—Or with a night-cap. (Renewed laughter.)

The Lord Chief Baron.—You must not only be aware of the habit, but that it tends to endanger life.

Baron Alderson.—I think you are bound to communicate to the office the evidence of any present disorder; but it is not necessary to go into circumstances which might possibly tend to shorten life.

The Lord Chief Baron.—Suppose a man about to effect an assurance lived in the neighborhood of Holinfirth, he would not be bound to state that as a circumstance tending to endanger life. Rule refused.

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